

Maternity, Paternity and Family Friendly Working

Response to the Recommendations of the Employment Forum and Law Drafting Instructions for Stage 1

Issued by the Social Security Minister on 18 June 2010

Introduction

The Employment Forum consulted publicly during June to August 2007 regarding the introduction of legislation relating to maternity, paternity and adoption leave, and family friendly, flexible working policies.

The consultation paper was extensive and detailed responses were received from an exceptional high number of respondents representing a wide range of interests and industries. The Forum issued its recommendations to the former Social Security Minister in June 2008 with the intention that the new rights would be introduced in two stages. Many of the respondents had indicated that it would be excessive to introduce the full range of new family related rights at the same time.

The Forum proposed a basic minimum set of rights in Stage 1; that pregnant women should have the right to time off work for antenatal care appointments, parents should have the right to take a period of maternity, paternity or adoption leave and the right to return to their job after that leave. This brings associated protection against detriment and dismissal on grounds of claiming these rights. Pages 3 to 4 provide a more detailed summary of the rights included in Stage 1.

In a second stage of legislation, the Forum recommended that the rights provided in Stage 1 should remain in place, plus additional rights including; 6 of the maternity leave weeks and the two weeks paternity leave funded at full pay by the States (up to the contributions ceiling); an additional 8 weeks unpaid maternity leave (subject to a 15 month qualifying period of employment), taking the total number of weeks leave available to 26 weeks; and the right to request a change to working conditions for all employees who have caring responsibilities for adults and children (subject to a 15 month qualifying period of employment with their employer).¹

¹The Forum's full recommendation is available on the website –

www.gov.je/employmentforum

Minister's response to the recommendations

The Minister accepts the Forum's recommendations in full for Stage 1 of family friendly rights and intends that the drafting of these proposed new rights will begin in 2010. The Minister had intended that law drafting would be undertaken during 2009, however States priorities changed due to the economic downturn and priority was given to developing an insolvency scheme, which is now under development.

The Minister will request that drafting begins on Stage 1 of the family friendly rights that, subject to States approval, would make provision for time off work for essential antenatal care and statutory periods of maternity, paternity and adoption leave.

The Minister appreciates that Stage 1 would bring a small cost to employers in respect of paid time off work for pregnant women to attend antenatal appointments and 2 weeks compulsory maternity leave, at full pay. However, these rights are fundamental, best practice rights for the health of mother and baby. The Minister believes that the proposed new family friendly rights would have a lesser financial impact than employers that had perhaps anticipated during consultation.

The legislative changes that would be required to meet the Forum's recommendations in regard to the Social Security benefits system will be drafted as part of Stage 1, but may need to take effect at a later stage. The Minister's intention is that the basic parental rights should not be delayed further by the necessity for a review of the funding and administrative changes that would be required prior to enacting changes to the benefits legislation. That review will be undertaken as soon as possible.

In addition, the Minister has proposed that Stage 1 of family friendly rights would give employees with caring responsibilities the right to request a change to their working conditions, subject to States approval. The Forum had recommended that this right should be introduced in Stage 2, however the Minister considers it important to make greater progress with family friendly rights and to give parents and carers this additional flexibility. The right to request flexible work would introduce an administrative procedure, but not necessarily a cost to employers.

The Minister agrees, in principle, with the Forum's recommendation that the other rights included in Stage 2 should be introduced at a later stage, as the proposals have more significant funding and administrative implications than the rights included in Stage 1.

The Minister intends that further consideration will be given the provisions as recommended for Stage 2 after Stage 1 has been implemented, when the Minister has had the opportunity to assess the impact and effectiveness of the new family related rights, particularly in regard to the progress of sex discrimination legislation.

SUMMARY OF PROPOSALS

Maternity

Antenatal care - From the start of employment, pregnant employees will have the right to paid time off work to attend essential antenatal care appointments.

Maternity leave – Employees will have the right to a maximum of 18 weeks maternity leave (with the Social Security benefit Maternity Allowance (MA) if entitled), consisting of;

- From the start of employment - two weeks **compulsory** leave immediately after childbirth at **full pay** (paid by the employer, subject to the deduction of MA) and six additional week's unpaid maternity leave which may be taken at the employees discretion, before or after the birth; and
- With a 15 month qualifying period of service - the right to an additional 10 weeks unpaid leave.

Starting maternity leave – An employee will be obliged to tell her employer that she is pregnant and wishes to take maternity leave no later than 24 weeks into the pregnancy (15 weeks before the baby is due) and to give the employer 4 weeks notice if she wants to change that start date.

Terms and conditions during leave - Other than pay, all terms and conditions of employment (including any benefits in kind) will continue to apply during the 18 weeks leave. Continuity of employment is protected during the statutory period of leave.

Right to return – An employee will have the right to return to her previous job following her maternity leave entitlement (up to 18 weeks) unless there has been a redundancy situation. The employer must be given 4 weeks notice if the employee wishes to return to work before her notified return date.

Keeping in touch – The employee will have the right to offer to voluntarily undertake unpaid work (e.g. meetings, training, updates) at any time during 16 weeks of her maternity leave (not the first 2 weeks compulsory leave) without the maternity leave period ending.

Paternity

Paternity leave – From the start of employment, an employee will have the right to two weeks unpaid paternity leave (whether male or female) who has, or expects to have, parental responsibility for the child.

Taking paternity leave - The employee will be obliged to advise their employer of the intention to take paternity leave 15 weeks before the expected date of birth. Leave must be taken within 8 weeks of the baby being born, in blocks of one week, unless a relevant agreement between the

employer and employee provides that the leave may be taken in a more flexible way (e.g. individual days).

Adoption

Adoption leave - The right to unpaid leave for each adoptive parent of a child of any age; the periods of leave being equivalent to maternity and paternity leave, but available to either adoptive parent, irrespective of gender, plus the right to return to work after each period of leave;

- Up to 18 weeks adoption leave, consisting of eight weeks unpaid leave from the start of employment, and an additional 10 weeks unpaid leave if the employee has a 15 month qualifying period of service with an employer,
- And 2 weeks unpaid leave for the other parent,

Taking adoption leave - Within one week of being notified by an approved adoption agency that they have been informally “matched” with a child for adoption, the employee must notify their employer of the following:

- i. That they have been newly matched with a child,
- ii. the date when the child is expected to be placed with them,
- iii. the date on which they intend to start their adoption leave, and
- iv. the period that is being claimed; the 18 week “maternity” leave period or the 2 week “paternity” leave period.

Social Security Benefits

The proposed changes to Social Security legislation each bring a potential cost to the States. The Department will review of the funding and administrative changes that will be required prior to enacting these parts.

The Maternity Allowance claim period will be amended so that women have the option to start the 18 week Maternity Allowance period closer to the birth so that the woman may take as much leave as possible after the birth with benefit (where entitled).

Unpaid “keeping in touch days” will be allowed during 16 weeks maternity leave (not the two compulsory weeks), without loss of Maternity Allowance for those days. The days would not break the maternity leave period and would continue to be treated as maternity leave days, not being paid by the employer.

Two weeks Paternity Allowance will be provided at a weekly rate equivalent to Maternity Allowance, plus Adoption Allowances equivalent to the Maternity and Paternity Allowances, where the adoptive parents may choose which of them will claim the longer benefit period, irrespective of the claimant’s gender.

Flexible Working (included in Stage 1 by the Minister for Social Security)

Employees who have caring responsibilities (for adults and children) will have the right to request a change to their working conditions, including, for example a change to hours, times or location of work, subject to a 15 month continuous period of employment with their employer.

The right is limited to a maximum of one request in a 12 month period. The employer is obliged to hold a meeting with the employee and to inform them of the decision regarding the requested change within 6 weeks of the request. Where a request is refused, the employee has a right of appeal.

DRAFTING INSTRUCTIONS

It is anticipated that these provisions will be introduced via an amendment to the Employment (Jersey) Law 2003 and that the rights will apply to employees as defined in that Law.

PART 1 – MATERNITY RIGHTS

Antenatal care

Women will be entitled to paid time off work to attend essential antenatal care. This is limited in its definition to clinic appointments for essential care and examinations and does not include optional antenatal classes. An employer must be entitled to ask for proof of appointments from a medical practitioner, such as an appointment card.

A woman should not have to make this a financial decision, to the possible detriment of her own health and that of her unborn child. On the grounds of health and safety, there should be no qualifying period of employment for the right to time off work for essential antenatal care. Neither the UK nor the Isle of Man requires a qualifying period of employment to qualify for the right to taking paid time off from work to attend an antenatal appointment.

The Forum recommends that, for simplicity, only the basic protection against being refused paid time off for antenatal care should be included in the legislation. For practical reasons, the Forum recommends that employees should not be required to seek their employer's agreement to the specific length of time needed off work for an appointment. This may not always be possible as waiting times can vary; clinic appointments generally taking longer than a doctor's appointment.

Guidance or a code of practice will outline –

- what an employer might expect in terms of a reasonable amount of time off for antenatal appointments and the likely timescales

involved for a normal regime of one appointment every 4 weeks from week 12 to week 40 of the pregnancy (7 appointments).

- that employers should be notified in advance of appointments to allow employers to arrange cover, where required.
- the employee should be reasonable in giving notice where possible.
- the employer must also be reasonable, having regard to medical opinion on the woman's antenatal care needs and the circumstances of her particular pregnancy.
- that an employee should communicate the dates and times of required antenatal appointments wherever possible.
- that it is reasonable for an employer to expect that a woman will try to arrange appointments outside of work time, in view of the fact that it would be problematic to legislate for the circumstances in which it is not possible.

Compulsory maternity leave

In accordance with European best practice, to safeguard the health of the mother, the Forum recommends that an employer must not allow a woman to return to work for two weeks after the date of childbirth. This is a minimum entitlement that will apply from the start of employment

An employer who allows or requires a woman to work during that period will be penalised; the level of the penalty to be subject to advice from the Law Officers or Law Draftsman. In the UK, it is a criminal offence to allow an employee to work during the two weeks after childbirth (or 4 weeks for factory workers), which were introduced to implement the European Directive on Pregnant Workers.

This time off work will be paid by the employer at full weekly pay, (in accordance with the calculation provided in Schedule 1 of Employment (Jersey) Law 2003). The employer may offset the maximum weekly Social Security Maternity Allowance from each week's pay, whether or not the woman is entitled to receive the benefit.

Breastfeeding rights

Responses to the Forum's consultation were not overwhelmingly in favour of provisions being made in regard to breastfeeding and many considered that legislative provisions would be excessive. The UK and Isle of Man do not give breastfeeding mothers specific rights in the workplace; health and safety legislation applies.

Jersey's health and safety legislation does not specifically refer to this issue, however it would generally be covered in any workplace risk assessment. Article 3 of the Health & Safety at Work (Jersey) Law, 1989, requires employers to identify and assess the risk to their employees' health and safety, in particular, requiring employers with 5 or more employees to record and assess significant risks, and the action taken to address them, in the written health and safety policy statement. Guidance states that employers

need to consider who may be affected by workplace hazards, including pregnant women. In addition, a code of practice exists which obliges employers to risk assess breastfeeding mothers who work with ionising radiation, the principles of which would be expected to be applied more widely in risky occupations.

The Forum noted research showing that wider strategies than simply improving employment rights would be necessary relating to social attitudes, for example that bottle feeding is the norm. The Forum noted evidence that breastfeeding rates have increased significantly in Norway in recent years; however Norway not only improved maternity rights and increased maternity leave, but also banned all advertising of artificial formula milk.

Most respondents indicated that if rights relating to breastfeeding were to be provided, they should apply for a limited period of time after childbirth, e.g. 6 months.

The Forum considered that if the woman returns to work 10 to 18 weeks after she has given birth, that will usually provide sufficient time for a feeding routine to have been established. The Forum recommended that if any provisions are made regarding breastfeeding mothers, a code of practice or guidelines should outline what should reasonably be provided, taking into account the recommendations of the World Health Organisation. The Forum noted that such rights might become an issue and require further consideration with the introduction of sex discrimination legislation in the future.

Maternity leave and pay

A woman will have the right to 18 weeks maternity leave in total, to correspond with the existing 18 week Social Security Maternity Allowance period. Two of those weeks would be the compulsory weeks, available with no qualifying period of employment, during which time the employer must pay employees their full weekly wage (minus the weekly Maternity Allowance).

In addition to the 2 compulsory weeks leave, women will have the right to an additional 6 weeks unpaid maternity leave (benefits and other contractual rights will continue to apply), also to be available from the start of employment and available for the woman to take before or after the birth.

This gives a total of 8 weeks leave, and the right to return to work after that period, with no qualifying period of employment.

When an employee has 15 months service with an employer, women will have the right to an additional 10 weeks unpaid leave (benefits and other contractual rights will continue to apply).

In order that employers and employees know where they stand in terms of entitlement to maternity leave, completion of the 15 month qualifying period must be based on the expected date of confinement notified to the employer

and the woman's entitlement to leave would not be affected by an early or late birth.

It is noted that there will be some employees who will have the right to leave but will not meet the contribution conditions for entitlement to the Maternity Allowance. The Forum recommends that 18 weeks leave must be available to women who qualify for it, irrespective of whether they qualify for the Social Security allowance.

Under Social Security Law, the Maternity Allowance claim period currently must start no later than six weeks before the notified date of birth. Where a woman chooses to work closer to the date of birth, she loses the right to those weeks of benefit, leaving only 12 weeks of benefit available after the birth. Women tend now to choose to work closer to the date of birth; currently women claim 16 of the 18 weeks benefit on average.

This provision was based on medical opinion regarding an appropriate period of time for a woman to take off work before the birth; however that is not supported by current medical opinion.

The Social Security Law will be amended so that women have the option to start the 18 weeks closer to the birth. This is likely to slightly increase the States funding required for maternity allowance as more women would take the full 18 weeks benefit.

Starting maternity leave

In the UK, an employee must tell her employer that she is pregnant and wishes to take maternity leave 24 weeks into the pregnancy (which is 15 weeks before the baby is due). After week 24, legal termination rights are no longer available in the UK. Legal termination rights are also available in Jersey until the 24th week².

An employee must tell her employer that she is pregnant and wishes to take maternity leave 24 weeks into the pregnancy (15 weeks before the baby is due). If an employee wishes to change the date on which she intends to start her maternity leave, she should have to give her employer 4 weeks notice. The employer must however give reasonable consideration to the circumstances and health of the mother and baby, and take into account situations which would reasonably override the requirement for 4 weeks notice to be given, such as medical certification that a change of date is necessary, or the baby is born early.

Sickness and Maternity

If a woman is medically certified as sick for a pregnancy related reason shortly prior to the birth and claims short term incapacity allowance, this automatically

² Under normal conditions, terminations are available in Jersey until the 12th week of pregnancy. Terminations between 12 and 24 weeks are only available in Jersey in extreme cases, when continuing with the pregnancy puts the mother's life in danger or there's serious foetal abnormality.

triggers the start date of her maternity allowance period and the woman is automatically be transferred to the maternity leave period.

This could cause the mother to lose a significant period of recovery and bonding time with her baby if the pregnancy causes her difficulties before the birth and also creates difficulties in terms of the benefits and leave periods, notified start date to employer.

For the purpose of co-ordinating leave and benefit, the maternity leave and benefit start date will be the date that is notified by the employee to their employer and to the Social Security Department. This will apply unless the birth is early, a different date is agreed with 4 weeks notice to the employer (or any required period of notice to the Social Security Department), or circumstances reasonably override the requirement for that notice to be given.

This requires a change to the Social Security Law and departmental administration. The Social Security Department will consider the budget implications of a potential increase in the incidence of pregnancy related sickness benefit claims in the six weeks prior to the start of the maternity leave, as it is anticipated that women will generally prefer to take as much of the maternity leave as possible after the birth.

Terms and conditions during maternity leave

Other than pay, all terms and conditions of employment will continue to apply during the period of statutory maternity leave, including provisions for the continuation of pensions and accrual of holiday entitlement. An employee's continuity of employment is therefore not broken by the statutory period of maternity leave and the period of leave will count as a period of employment. Continuity of employment must apply for periods of statutory paternity and adoption leave.

Entitlement to a bonus will depend on the type of bonus and the terms of the scheme. If the employee would have been entitled to the bonus under her contract of employment had she not been on maternity leave, her entitlement will depend on whether the bonus is for past achievement (in which case it must be paid in full) or for current work (in which case it may be reduced pro rata for the period of leave).

Guidance will encourage employers to specify in the contract of employment if there are particular conditions regarding the use of benefits in kind provided for work related use (e.g. accommodation) during the period of maternity leave.

Keeping in touch

Women will have the right to **voluntarily** offer to work on any days during her maternity leave, other than the 2 weeks compulsory leave. Volunteering to work on a maternity leave day will not give the woman the right to claim any additional days' leave or pay in compensation.

To tie in with benefit entitlement, this will require an amendment to the Social Security Law so that Maternity Allowance is not lost on days that the employee “keeps in touch” and the keeping in touch days would not break the maternity leave, continuing to be treated as maternity leave days, not being paid by the employer.

Guidance will provide further detail for employers and employees around agreeing the number of “keeping in touch days” (they are expected to be part days and irregular) and the reasons, e.g. a meeting or a training course, rather than a full day’s normal work.

Guidance will also outline the grounds on which a woman **may** be contacted by the employer whilst on maternity leave as it is likely to be difficult to provide an exhaustive list and will vary depending on the circumstances, including, for example, the employees own career opportunities. The employer and employee should formalise in writing before the maternity leave the circumstances in which she is willing to be contacted and wishes to be contacted (for example, regarding training sessions, staff updates, job opportunities and changes to the workplace).

Returning to work after maternity leave

A woman will have the right to return to the same job (unless there has been a redundancy situation), after her period of maternity leave, up to the 18 weeks available. If the employee stays off work longer than the period of statutory leave (or a longer period as agreed with her employer) the employee is not entitled to be reinstated to her previous position.

If an employee wishes to return to work before her planned return date, she must give her employer 4 weeks notice.

Unlike in the UK, a woman who is made redundant during her maternity leave will not have the right, over and above the rights of her colleagues, to be offered any other suitable vacancies that arise. However the employer must include employees who are on maternity leave when circulating details of planned redundancies and alternative vacancies.

If a woman does not return to work after her maternity leave entitlement, she may be required to refund any part of pay provided by her employer during the 2 weeks compulsory paid maternity leave, unless the woman returns to work after her leave and gives an appropriate period of notice to terminate her employment.

PATERNITY LEAVE

Employees will have the right to Paternity leave where they have, or expect to have, responsibility for the up bringing of a child, and must be either the biological father of the child, or the partner (or husband) of the child’s

mother. A partner is defined as someone living in an enduring family relationship with the mother but who is not an immediate relative.

The assessment of whether an employee qualifies for the leave will be achieved in the same way as in the UK; whereby the employee self-certifies their eligibility for paternity leave and the employer makes a reasonable judgement as to whether the employee meets the criteria.

The States policy on paternity leave has been amended to include rights for same-sex partners and there has not been a noticeable increase in demand for the leave.

Two weeks unpaid paternity leave will be available (unless the employee has a contractual right to paternity pay from their employer).

A Social Security benefit will be introduced at a weekly rate equivalent to Maternity Allowance, subject to the Department undertaking the necessary research via the Social Security review. When paternity benefit is available, employers who provide a contractual entitlement to paid paternity leave may offset the benefit against the employee's weekly pay.

Taking paternity leave

Given that paternity leave is to be unpaid (other than benefits or contractual pay), the two weeks paternity leave will be available with no qualifying period of employment, however the employee must advise their employer of their intention to take paternity leave 15 weeks before the expected date of birth, (not necessarily the intended leave date), which means that only employees with more than 15 weeks service will have the right to take paternity leave.

The two weeks paternity leave must be taken within eight weeks after the baby is born (and not before the birth). This allows sufficient flexibility for special situations to be taken into account, such as where the baby might be in hospital for a longer period, but is limited enough to ensure that the leave is taken for the purpose of the birth (bonding with the baby and supporting the mother).

The UK provision is considered to be practical; that in the absence of an agreement between the two parties, the default position should be that paternity leave must be taken in blocks of one week, unless a relevant agreement provides that the leave may be taken in a more flexible way, e.g. single days.

ADOPTION LEAVE

There are currently around 7 to 8 adoptions each year in Jersey (including both local and inter-country adoptions). A one-off Adoption Grant payment is available to adoptive parents from the Social Security Department, which is an

equivalent sum to the Maternity Grant, but there is no equivalent to the weekly Maternity Allowance.

Adoptive parents will have the right to adoption leave, equivalent to the maternity leave for one parent and equivalent to paternity leave for a second adoptive parent (irrespective of gender). The right to adoption leave will apply irrespective of the age of the child being adopted. Adoption leave will not be available where there is already an established relationship with the child, such as a step-parent adoption or where the parents have fostered the child prior to adoption.

Adoptions placements often happen at short notice after a couple have waited a long time to be notified of a suitable placement. The qualifying period of employment for adoption leave will be the same as for maternity and paternity leave, which means that the parent taking the adoption leave would be entitled to 8 weeks leave with nil qualifying period and a further 10 weeks having served a 15 month qualifying period.

Although the first 2 weeks leave will be available to an adoptive parent with no qualifying period of employment, the parent will not be obliged to take the weeks off work, as with compulsory maternity leave, given the absence of the need for physical recovery following childbirth. The adoptive parent will therefore not be entitled to receive full pay (topped up from benefit levels) from the employer for those two weeks leave.

The Social Security Department will at a later stage provide a weekly benefit for adoptive parents, equivalent to the maternity and paternity allowances. However until that time, the right to adoption leave will be available, without pay, unless the employee has a contractual entitlement to adoption pay.

The adoptive parents will be eligible to choose either the maternity leave period or the paternity leave period (irrespective of gender) and must inform their employer which period is being claimed when giving notice of the intention to take leave.

Employees will be required to self-certify to their employer that only one parent is claiming the 18 week leave period and the other parent is claiming the 2 week period, e.g. by showing proof of receipt of the Social Security Adoption Grant, if either employee is entitled to it.

It is noted that the States Humans Resources policy on adoption leave allows the total period of adoption leave to be taken in any proportion by either parent where both are employed by the States of Jersey. This may be an option in other businesses where both employees work for the same employer, however allowing the leave period to be shared by both adoptive parents in any proportion they wish where employees do not work for the same employer brings problems of administration.

It will often be difficult for adoptive parents to give their employer notice of a placement, or of the intention to take time off. Within one week of being

notified by an approved adoption agency that they have been informally matched with a child for adoption, adoptive parents must notify their employer(s) of the following:

- i. That they have been newly matched with a child,
- ii. the date when the child is expected to be placed with them,
- iii. the date on which they intend to start their adoption leave, and
- iv. the period that is being claimed; the 18 week “maternity” leave period or the two week “paternity” leave period.

A child will generally be informally matched with a couple before formal matching occurs. Formal matching requiring the approval of an adoption panel and the court and may occur later in the process, sometimes after the child has already been placed.

FLEXIBLE WORKING

Employees who have caring responsibilities (for both children and adults) will have the right to request a change to their working conditions if they have worked for their employer for 15 months or more. It is noted that this goes beyond the UK provisions where the right is available to parents of children under age 16, or under age 18 if the child is disabled, and carers of adults.

The right will be limited to a maximum of one request in a 12 month period. The employer will be obliged to hold a meeting with the employee and inform them of the decision within 6 weeks of the request. The employee will have a right of appeal from that decision, and the existing statutory right to representation by a work colleague or a registered trade union official will be extended to these appeal meetings.

Employers will be penalised for failure to follow the procedures; the level of penalty to be subject to the Social Security Minister receiving advice from the Law Officers or Law Draftsman.

As in the UK and Isle of Man, the legislation will include the business grounds on which an employer may refuse a request;

- burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to reorganise work amongst existing staff or to recruit additional staff;
- detrimental impact on quality or performance;
- insufficient work during the periods the employee proposes to work;
- planned structural changes.

A code of practice will specify that the employer may choose to ask the employee how the proposed change might impact on the business, but not being able to do so would not preclude an employee from making a request to

work flexibly; it is ultimately for the employer to decide if the business can accommodate the request.

OTHER ISSUES

Automatically unfair dismissal

When an employer terminates an employees' contract, this is classed as a dismissal under the Employment Law. The Employment Law provides a number of "automatically" unfair reasons, which means that the normal upper age limit and length of service requirements do not apply.

Article 68 of the Employment Law already provides that to dismiss an employee for asserting a statutory right is automatically unfair, that is, from day one employment, not requiring 26 weeks service to qualify. Employees will therefore already be protected in regard to asserting one of the new statutory rights.

Article 70 of the Employment Law will be extended so that an employee will also be regarded as having been automatically unfairly dismissed if selected for redundancy on grounds of asserting one of these new family related statutory rights, when the circumstances constituting the redundancy applied equally to other employees in the undertaking who held similar positions and who have not been selected for redundancy.

Under Article 67 of the Employment Law; "Dismissal for family or other reasons", Regulations may be made prescribing reasons for dismissal relating to pregnancy, childbirth or maternity, redundancy or other factors. Regulations were intended to be introduced when the policies relating to maternity and other family issues had been developed. Any such additional provisions will provide additional protection, particularly given the lack of sex discrimination legislation.

Regulations will prescribe that an employee will be regarded as having been unfairly dismissed, from day one of employment, if the reason or principal reason for the dismissal relates to; an employee's pregnancy or intention to adopt a child, or the taking of a period of statutory maternity, paternity or adoption leave.

The Regulations will also prescribe that an employee will be regarded as having been unfairly dismissed, from day one of employment, if selected for redundancy on the above grounds when the circumstances constituting the redundancy applied equally to other employees in the undertaking who held similar positions, but have not been selected for redundancy.

Temporary Agency Employees

Jersey's Employment Law gives agency workers "employee" rights and recruitment agencies have adapted their practices to the existing legislation.

On the basis of potential discrimination and equality issues, temporary agency and zero hours employees will not be exempt from the new provisions.

The crucial issue for recruitment agencies will be determining how payments will be calculated when employees might have contracts with many agencies and may not have undertaken any work for that agency in the months leading up to the birth.

In this situation, pay will be pro-rated for multiple employers (including agencies) and the method of calculation must be included in the legislation referring to a calculation period starting from 26 weeks prior to the date on which the employee has notified her employer that she wishes to start her maternity leave (unless the baby is born early, or circumstances dictate a different start date).

The onus must be on the employee to give notice to any employers whom she is working for (or may work for) during the period up to the birth, that she intends to take maternity leave, and as with any other employee, this notice must be given 15 weeks before the baby is due.

Any employers whom she has worked for during that period will be required to pay her a proportion of two weeks pay, which would be zero in cases where she had not worked for that employer during the relevant period. There would be no requirement for employers to exchange information as they would only need to calculate the sum due on the basis of their own records in regard to that employee.

In regard to the two compulsory weeks maternity leave which the employer is required to pay in full, each employer would pay the zero hours employee a proportion based on the average pay and length of placements for that employee during the 26 weeks preceding the date on which she notified her employer(s) that she intends to take maternity leave.

The same method will also be applied to calculate any pay that a woman will receive when she takes time off work for antenatal care (to be calculated in accordance with her pay and duration of any placements during the 26 weeks preceding the date of notification of the intention to take maternity leave), and at stage 2 where eight weeks leave are proposed to be paid by the States at 100% of salary (up to the Social Security contributions ceiling).

Sex Discrimination legislation

The Forum's recommendations were presented at a time when sex discrimination legislation was thought to be imminent and it was considered essential that sex discrimination legislation underpinned the new family friendly rights.

If Jersey introduced sex discrimination legislation without any additional provisions regarding maternity rights, any less favourable treatment which has

its root cause in pregnancy would be likely to be seen by a tribunal as direct sex discrimination, as pregnancy is a gender-specific condition.

Whilst without sex discrimination legislation the proposed new legislation will protect parents who are already working, there is a risk that parents (women of child bearing age in particular) may suffer in recruitment as employers could chose not to employ women of child bearing age, particularly if employers consider the new rights to be onerous. Although only minimum entitlements are provided at stage 1, there will be small financial and administration implications for employers.

It is important that the Law Officers' identify any particular issues that may arise with the new rights in respect of the interplay with sex discrimination during the drafting of the legislation.
