CONSULTATION PAPER

Codes of Practice

Issued by the Employment Forum on 25 February 2013
Deadline for responses –1 April 2013

CONTENTS

SECTION 1 - PURPOSE OF CONSULTATION

The Employment (Jersey) Law 2003 (the 'Employment Law') enables the Minister for Social Security (the 'Minister') to approve codes of practice for the purposes of the Employment Law, subject to certain requirements being fulfilled:

- The Minister must consult the Jersey Advisory and Conciliation Service (JACS), the Employment Forum (the 'Forum') and other persons, or representatives of such persons that might be affected.

- A notice must be published in the Jersey Gazette advising the public that the code of practice is available for inspection and that representations may be made to the Minister within a 28 day period.

In order to fulfill those statutory requirements, the Minister has asked the Forum to circulate three revised codes of practice for consultation (attached as Appendices 1 to 3). The Forum will consider and notify the Minister of any representations that are received and will make a recommendation to the Minister.

SECTION 2 – BACKGROUND

Codes of practice may be approved by the Minister for the purposes of the Employment Law. Whilst a person is not liable to any proceedings for failure to observe any provision of a code of practice, a code of practice is admissible as evidence in proceedings before a Court or Tribunal. If a provision of a code of practice is relevant to any question arising in proceedings, a Court or Tribunal must take that provision into account in determining the question.

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Codes of Practice

Generally, codes of practice might be issued for any of the following purposes;

1. To help employers and employees to understand the obligations, responsibilities and entitlements associated with the Law.
2. To give employers and employees practical guidance.
3. To help advisers, including lawyers, trades union representatives and human resources specialists.
4. To guide employment tribunals and courts.
5. To make sure that anyone who is considering bringing legal proceedings understands the legislation and is aware of good practice.

Four codes of practice were approved by the former Employment and Social Security Committee, following public consultation, in July 2005[1].

CODE 1 - Disciplinary and Grievance Practice and Procedures
CODE 2 - Uninterrupted Rest Days
CODE 3 - Therapeutic Work
CODE 4 – Minimum Wage – Accredited Training Rate

The codes of practice were prepared in 2005 and so they may be out-of-date to the extent that significant re-drafting is required in certain areas.

The 'Disciplinary and Grievance Practice and Procedures' code of practice was revised in 2007 to reflect an amendment to the Employment Law that introduced a statutory right to representation in formal disciplinary and grievance hearings.

The 'Minimum Wage – Accredited Training Rate' code of practice sets out the circumstances in which training is deemed to be approved by the Minister for the purpose of permitting payment of the lower minimum wage rate for trainees. From April 2013, that code of practice will be replaced with a Ministerial decision that will set out the descriptions and classes of training that are approved by the Minister for the purpose of paying the trainee rate.

Approval of Codes of practice

Article 2A of the Employment Law requires that, prior to approving any code of practice for the purposes of the Employment Law, the Minister must publish a notice in the Jersey Gazette –

a) stating that a copy of the code of practice will be available for inspection during normal working hours, free of charge, at a place specified in the notice;

[1] www.jacs.org.je/section/30/index.html

b) specifying a period during which it will be available for inspection (being a reasonable period of not less than 21 days, beginning after the notice is published); and

c) explaining that anyone may make representations in writing to the Minister in respect of the code of practice at any time before the expiry of the 7 days following the period for inspection.

In addition to the requirement to publish a notice in the Gazette, the Employment Law also requires the Minister to consult JACS, the Forum and other persons, or representatives of such persons that might be affected.

The Minister has asked the Forum to review and circulate three draft codes of practice and make a recommendation to him, so that he may consider any representations prior to publishing a notice in the Gazette and approving the revised codes of practice.

SECTION 3 – CHANGES TO THE CODES OF PRACTICE

1. CODE 1 - Disciplinary and Grievance Practice and Procedures

The purpose of this code of practice is to provide practical guidance to employers, employees and their representatives, as well as to the Employment Tribunal (the 'Tribunal'), on the application of grievance and disciplinary procedures and best practice.

As a result of a Proposition to the States in November 2011[2], the Minister directed the Forum to consult on whether the code of practice should be amended to describe the circumstances in which an employer should consider permitting employees to be represented by a representative, other than a work colleague or a trade union representative. The Forum proposed amendments to paragraphs 45 and 50 which are included in this draft of the code of practice (attached at Appendix 1). This draft has also been amended to update any outdated references.

The processes set out in this code of practice might no longer be in accordance with current disciplinary and grievance best practice in some respects, and the code does not reflect the Tribunal's judgements since 2005. In particular, the Forum would propose that this code of practice should be simplified and that the sections that relate to rules and procedures should be reviewed. The Forum would welcome your views on whether the provisions are appropriate.

[2] Disciplinary and Grievance Hearings: Right to a friend', (P.112/2011)

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2. CODE 2 - Uninterrupted Rest Days

The draft code of practice (attached at Appendix 2) has been revised to replace outdated references, for example, to the former Employment and Social Security Committee.

The purpose of this code of practice is to provide guidance to employers and employees, as well as to the Tribunal, as to what counts as 'interrupted' rest for the purpose of statutory rest day entitlement. The intention is to enable employers to make appropriate arrangements that meet the statutory requirement to provide 'uninterrupted' rest days where an employee spends time 'on-call' or 'on standby'.

3. CODE 3 - Therapeutic Work

The draft code of practice (attached at Appendix 3) has been revised to replace outdated references, as well as to remove paragraphs that were repetitious and unnecessary. For example, Section 4 has been removed which provided an unnecessary list of the types of support and benefits available from various organisations that relate to therapeutic work.

The purpose of this code of practice is to provide guidance to persons undertaking therapeutic work-like activity, to schemes and organisations that provide therapeutic work-like activity, as well as to the Tribunal, to assist in determining whether the relationship between two parties is that of employee and employer, or client and therapeutic work provider.

SECTION 4 – PROVIDING COMMENTS ON THE CODES OF PRACTICE

You are welcome to submit your comments by **1 April 2013** by email or by post:

E.Forum@gov.je

Employment Forum, P.O. Box 55, La Motte Street, St Helier, JE4 8PE.

Please provide the following information with your comments;

1. State your name and contact details.
2. Indicate whether your comments are submitted on behalf of particular business or organization.
3. Indicate if you would prefer your comments to be quoted anonymously, attributed to you personally, or attributed to your business or organization.

APPENDIX 1

Disciplinary and Grievance Practice and Procedures

Introduction

1. Under the terms of Article 2A of the Employment (Jersey) Law, 2003 (the 'Employment Law'), the Minister for Social Security is empowered to approve any code of practice for the purposes of that Law.

2. The provisions of this code of practice are admissible in evidence and may be taken into account in determining any question arising in proceedings before the Jersey Employment Tribunal (the 'Tribunal') or a court. Failure to observe any provision of an approved code of practice does not, of itself, render a person liable to any proceedings, other than where the code of practice refers to Part 7A of the Employment Law regarding the "right to representation" (see section 3). Whilst every effort has been made to ensure that the summary of the relevant statutory provisions included in the code of practice is accurate, only the Tribunal and the courts can interpret the law authoritatively.

Section 1 – Disciplinary procedures

Why have disciplinary rules and procedures?

3. Whilst employers are not required by statute to have disciplinary rules and procedures it is good employment relations practice so as to promote fairness and order in the treatment of individuals and in the conduct of employment relations. They also assist an organisation to operate effectively. Rules set standards of conduct at work; procedures help to ensure that the standards are adhered to and also provide a fair method of dealing with alleged failures to observe them.

4. It is important that employees know what standards of conduct are expected of them. Further, the Employment Law requires employers to provide written information for their employees in relation to any disciplinary rules and procedures that are relevant[3].

[3] Part 2 of the Employment (Jersey) Law 2003 requires employers to provide employees with a written statement of the main terms and conditions of their employment. Such statements must specify any terms and conditions relating to disciplinary and grievance procedures that are applicable. The employer may satisfy these requirements by referring the employees to a reasonably accessible document, which provides the necessary information.

5. The importance of disciplinary rules and procedures has also been recognised in legislation, which allows for the fairness of a dismissal to be challenged before the Tribunal. Although an employee's "conduct" is recognised by the Employment Law[4] as a potentially valid reason for dismissal, the section further states that a dismissal must be reasonable in all the circumstances[5]. This means that not only should dismissal be appropriate to the seriousness of the particular situation, but also the steps taken by the employer before deciding to dismiss ought to conform to a certain standard. Where a dismissal is found by the Tribunal to have been unfair, the employer is liable to pay compensation to the employee.

Formulating Policy

6. Managers are responsible for maintaining discipline and for ensuring that there are satisfactory disciplinary rules and procedures. However, if they are to be effective, the rules and procedures need to be accepted as reasonable both by those who are covered by them and by those who operate them. Employers should therefore aim to secure the involvement of employees when formulating new rules and procedures or revising existing rules and procedures. Where a trade union or staff association is recognised it would often be appropriate for its officials to participate in developing the procedures.

Rules

7. It is unlikely that any set of disciplinary rules can cover all circumstances; moreover the rules will vary according to particular circumstances such as the type of work, working conditions and size of establishment. When drawing-up rules the aim should be to specify clearly and concisely those necessary for the efficient and safe performance of work and for the maintenance of satisfactory relations within the workforce and between employees and their employer. Rules should not be so general as to be meaningless.

8. Rules should be readily available and managers should make every effort to ensure that employees know and understand them. This may be best achieved by giving every employee a written copy of the rules[6]. In the case of new employees this should form part of an induction programme. Special

[4] The Employment (Jersey) Law 2003, Article 64(2)(b).

[5] The Employment (Jersey) Law 2003, Article 64(4)(a) and (b) provides that "the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case".

[6] See footnote (1)

allowance should be made for individuals whose first language is not English or who have a disability.

9. Employees should be made aware of the likely consequences of breaking rules. In particular they should be given a clear statement of the type of conduct that may warrant summary dismissal. If a rule prohibiting certain conduct has fallen into disuse through not having been the subject of recent disciplinary action, it is important that employees are given notice by their employer that the rule will again apply. This approach should be adopted even if the rule is written.

Essential features of disciplinary procedures

10. Disciplinary procedures should not be viewed primarily as a means of imposing sanctions. They should be designed to emphasise and encourage improvements in individuals' conduct. In this way, the reasonable and consistent use of disciplinary rules and procedures will benefit employers in promoting good employee relations and in reducing the number of issues that arise for consideration.

11. Disciplinary procedures should:

(a) Be in writing.

(b) Specify to whom they apply.

(c) Not discriminate against any employee because of their sex, race, colour, language, religion, disability, political view or any other status.

(d) Provide for matters to be dealt with quickly.

(e) Indicate the disciplinary actions which may be taken and specify the normal duration of warnings.

(f) Specify those managerial and/or supervisory levels that have authority to take the various forms of disciplinary action, ensuring that immediate superiors do not normally have the power to dismiss without reference to senior managers.

(g) Provide for employees to be informed of the complaints against them and, where possible, all relevant evidence before any hearing.

(h) Provide employees with an opportunity to state their case before a decision is reached.

(i) Clarify whether the statutory right to be represented applies to the hearing, and who may represent the employee (see section 3).

(j) Ensure that, except for gross misconduct, an employee is not dismissed for a first incident of misconduct.

(k) Ensure that disciplinary action is not taken until the case has been investigated properly, and in a manner appropriate to the circumstances.

(l) Provide for a written explanation for any penalty imposed.

(m) Include a right of appeal and specify the procedure to be followed.

The procedure in operation

12. When a disciplinary matter arises, the supervisor or manager should establish the facts promptly before recollections fade, taking into account the statements of any available witnesses, which should be recorded in writing. In serious cases consideration could be given to a brief period of suspension while the case is investigated. This suspension should be with pay unless the circumstances justify otherwise.

The employee should be advised of their rights under the procedure and their statutory right to be represented by a fellow employee or a trade union official (see section 3). Before a decision is made, the employee should be interviewed and given the opportunity to state their case. The employee should be given sufficient time to prepare their case and the written records of any witnesses' statements should be made available to the employee (although in exceptional circumstances they may be amended, but only to maintain anonymity). If the employee challenges the statement it may clarify matters if the witness attends the interview, provided the witness is willing to do so.

13. After investigation and interview, it may be that a situation can be best dealt with informally or by counselling the employee. Counselling may help if the employee's actions are caused, or contributed to by medical, psychological or private circumstances. In many such cases, professional support will be important. In such cases it may be inappropriate to continue with the disciplinary procedure.

14. Often supervisors will give informal oral warnings for the purpose of improving conduct after minor infringements of standards of conduct. However, where

the facts of a case appear to call for disciplinary action, other than summary dismissal, the following procedure should normally be observed:

(a) In the case of minor offences the employee should be given a formal oral warning, or if the issue is more serious, a written warning setting out the nature of the offence and the likely consequences of further misconduct. In either case the employee should be advised that the warning is the first formal stage of the procedure.

(b) Further misconduct might warrant a final written warning which should contain a statement that any recurrence would lead to suspension, transfer, demotion or dismissal, as the case may be.

(c) The final step might be disciplinary suspension without pay or transfer or demotion (but only if these are allowed for by an express or implied condition of the contract of employment), or dismissal, according to the nature of the misconduct. Suspension without pay should be treated with caution. It should not normally be for a prolonged period.

15. Any disciplinary sanction should be confirmed in writing to the employee and should include details of any right of appeal, how to make it and to whom, even if the employee has previously received a written procedure outlining this.

16. When deciding on the disciplinary action to be taken, the supervisor or manager should bear in mind the test of reasonableness in all the circumstances. This means that, after investigation and interview, the employer should be able to demonstrate if called upon to do so that there are reasonable grounds for believing that the employee has committed the act(s), which are the subject of the disciplinary proceedings. So, at the very least, the supervisor or manager should consider it more likely than not that the employee is responsible. This standard should be applied not only to decisions regarding dismissal but also to those concerning warnings or other measures. So far as is possible, account should be taken of the employee's record and any other relevant factors -- although consistency of overall standards is important, each case must be considered on its merits, including an employee's particular situation.

17. Special attention should be given to the way in which disciplinary procedures are to operate in certain cases. For example:

(a) Employees to whom the full procedure is not immediately available. Provision may have to be made for the handling of disciplinary matters among nightshift workers, workers in isolated locations or depots or others who may

pose particular problems, for example because no-one is present with the necessary authority to take disciplinary action.

(b) Trade union officials. Disciplinary action against a trade union official can lead to a serious dispute if it is seen as an attack on the union's functions. Although normal disciplinary standards should apply to officials' conduct as employees, where the union is recognised, no disciplinary action beyond an oral warning should be taken until the case has been discussed with a senior trade union representative or full-time official.

(c) Criminal offences outside employment. These should not be treated as automatic reasons for dismissal. The main considerations should be whether the offence is one that makes the employee unsuitable for his or her work or in some circumstances, unacceptable to colleagues. Employees should not be dismissed solely because a charge against them is pending or because they are absent through having been remanded in custody for a short period. As such circumstance are likely to vary, appropriate advice should be taken, e.g. from JACS, before dismissing an employee in such circumstances.

Appeals

18. Grievance procedures can be used for dealing with individual disciplinary appeals. A preferred process of providing for an appeal, however, is through a specific provision in the disciplinary procedure.

Records

19. Records should be kept detailing the nature of a breach of disciplinary rules, the action taken and the reasons for it, whether an appeal was lodged, its outcome and any subsequent developments. These records should be kept confidential and retained in accordance with any relevant provisions of the Data Protection (Jersey) Law, 2005. The employee should be asked to sign the records to confirm that they represent an accurate and complete record of the meeting(s).

20. Except in special circumstances, breaches of disciplinary rules should be disregarded after a specific period of satisfactory conduct, normally no more than twelve months. The duration of any warning should be communicated to the employee and recorded in any written warning given to the employee, particularly if that duration exceeds the normal period specified in a disciplinary procedure.

21. Rules and procedures should be reviewed periodically in the light of any developments in employment legislation or industrial relations practice to

ensure their continuing relevance and effectiveness. Any amendments and additional rules imposing new obligations should be introduced and applied after reasonable notice has been given to all employees and, where appropriate, their representatives have been consulted. Changes to individual contracts should only be made with agreement, except in exceptional circumstances where advice should be sought.

Section 2 – Grievance procedures

Why have a grievance procedure?

22. In any organisation employees may have problems or concerns about their work, working environment or working relationships that they wish to raise and have addressed. A grievance procedure provides a mechanism for these to be dealt with fairly and speedily, before they develop into major problems and potentially collective disputes.

23. Whilst employers are not required by statute to have a grievance procedure it is good employment relations practice to provide employees with a reasonable and prompt opportunity to obtain redress of any grievance. Employers are statutorily required in the written statement of terms and conditions of employment to specify what grievance procedures are available to employees (see footnote 1).

24. In circumstances where a grievance may apply to more than one person and where a trade union or staff association is recognised, it may be appropriate for the problem to be resolved through collective agreements between the trade union(s)/staff association and the employer.

Formulating procedures

25. It is in everyone's best interest to ensure that employees' grievances are dealt with quickly and fairly and at the lowest level possible within the organisation at which the matter can be resolved. Management is responsible for taking the initiative in developing grievance procedures which, if they are to be fully effective, need to be acceptable to both those they cover and those who have to operate them. It is important therefore that senior management aims to secure the involvement of employees and their representatives, including trade unions where they are recognised, and all levels of management when formulating or revising grievance procedures.

Essential features of grievance procedures

26. Grievance procedures enable individuals to raise issues with management about their work, or about their employers', clients' or their fellow workers' actions that affect them. It is impossible to provide a comprehensive list of all the issues that might give rise to a grievance but some of the more common issues include: terms and conditions of employment; health and safety; relationships at work; new working practices; organisational change and equal opportunities.

27. Procedures should be simple, set down in writing and rapid in operation. They should also provide for grievance proceedings and records to be kept confidential.

28. The procedures should recognise that employees have a statutory right to be represented at grievance hearings, either by a fellow employee or by a trade union official (see section 3).

29. In order for grievance procedures to be effective, it is important that all employees are made aware of them and understand them and, if necessary, that supervisors, managers and employee representatives are trained in their use. Wherever possible, every employee should be either given a copy of the procedures, or provided with access to it (e.g. in the personnel handbook or on the company intranet site). Special allowance should be made for individuals whose first language is not English or who have a visual impairment or some other disability.

The procedure in operation

30. Most routine complaints and grievances are best resolved informally in discussion with the employee's immediate line manager. Dealing with grievances in this way can often lead to speedy resolution of problems and can help maintain the authority of the immediate line manager who may well be able to resolve the matter directly. Both manager and employee may find it helpful to keep a note of such an informal meeting.

31. Where the grievance cannot be resolved informally it should be dealt with under the formal grievance procedure. The number of stages contained in the procedure will depend on the size of the organisation, its management structure and the resources it has available. It is for employers to decide the procedure suitable for their business, taking into account the need to develop a fair procedure. A model grievance procedure is included in the Annexe to this code of practice.

32. In most organisations it should be possible to have at least a two-stage grievance procedure. However, where there is only one stage, for instance in very small firms where there is only a single owner/manager, it is especially important that the person dealing with the grievance acts impartially.

33. In certain circumstances it may, with mutual agreement, be helpful to seek external advice and assistance during the grievance procedure. For instance where relationships have broken down an external facilitator might be able to help resolve the problem.

Special considerations

34. Although not required by law, some organisations may wish to have specific procedures for handling grievances about unfair treatment e.g. discrimination or bullying and harassment, as these subjects are often particularly sensitive. Organisations may also wish to consider whether they need a whistle-blowing procedure. This provides strong protection to employees who raise concerns about wrongdoing (including frauds, dangers and cover-ups), but again is not required by law.

35. Sometimes an employee may raise a grievance about the behaviour of a manager during the course of a disciplinary case. Where this happens and depending on the circumstances, it may be appropriate to suspend the disciplinary procedure for a short period until the grievance can be considered. Consideration might also be given to bringing in another manager to deal with the disciplinary case.

Records

36. Records should be kept detailing the nature of the grievance raised, the employer's response, any action taken and the reasons for it. These records should be kept confidential and retained in accordance with any relevant provisions of the Data Protection Law. Copies of any meeting records should be given to the individual concerned although in certain circumstances some information may be withheld, for example to protect a witness. The employee should be asked to sign the records to confirm that they represent an accurate and complete record of the meeting(s).

37. All documents to be used in a disciplinary and grievance hearing must be fully disclosed by both parties within a specified time (e.g. within five days of the hearing).

Section 3 - Arranging for Disciplinary and Grievance Hearings

The right to be represented

38. The right to be represented is important to ensure a fair process. Part 7A of the Employment Law gives employees the right to be represented where their employer requires or requests them to attend a disciplinary or grievance hearing and the employee tells the employer that he or she wishes to be represented at the hearing.

39. The right to be represented only applies to disciplinary hearings where the hearing could result in a formal written warning or some other formal disciplinary action being taken against the employee (or the confirmation of one of the above), including appeal hearings. Informal disciplinary hearings, such as meetings to investigate an issue, do not attract the right to be represented. If it becomes clear during the course of such a meeting that disciplinary action is necessary, a formal hearing should be arranged where the employee has the right to be represented.

40. Grievance hearings also attract the right to be represented where an employer deals with an employee's complaint about the performance of a duty (whether statutory or contractual) owed to them by their employer. For example, a grievance about a pay rise is unlikely to fall within the definition, unless the right to a pay rise is specified in the employee's contract.

41. The Employment Law provides that an employee may be represented by one of the following people in formal disciplinary or grievance hearings:

    (a) A fellow employee who is employed by the same employer;

    (b) An employed trade union official (who may or may not be an official of a union that is recognised by the employer, but the union must be registered under the Employment Relations (Jersey) Law, 2007); or

    (c) A trade union official who is not employed by a union, but whom the union has reasonably certified in writing as having experience of, or having received training in, acting as an employee's representative at disciplinary or grievance hearings.

42. An employee may choose an official from any trade union, regardless of whether the union is recognised by the employer. Where a trade union is recognised in a workplace, it is good practice for the employee to ask an official from that union to represent them. Trade unions should ensure that officials are trained in the role of representing employees.

43. An employee does not have to be a member of a trade union in order to request representation by that union. Fellow employees and union officials are not obliged to accept a request to represent an employee and should not be pressurised to do so.

44. Where there is a dispute about the chosen representative, the Employment Law provides that the Tribunal may consider whether the location of the chosen representative at the time of the request for a hearing makes the choice of that representative unreasonable (e.g. geographically remote).

45. To ensure a fair process, an employer should give consideration to reasonable requests for other types of representatives in circumstances that are appropriate for both parties. Some employers may extend the right further via employees' contracts or company procedures, giving employees a contractual right to be represented by someone who may or may not be an employee of the same organisation, e.g. a partner, spouse, friend or legal representative. Whatever decision is taken by the employer in this respect, it is advised that the procedure should specifically address this issue to prevent disagreement and/or confusion from arising.

46. The Employment Law provides that there should be flexibility in setting the time and date of the hearing, so that hearings are not allowed to drift, but that there is consideration of the reasonableness of employers' actions and employees' requests.

47. If a chosen representative cannot be available at the proposed hearing time, the Employment Law gives employees the right to propose an alternative time, which must be reasonable for both parties and within 5 working days of the date proposed by the employer. In proposing an alternative date, the employee should have regard to the availability of the relevant manager, e.g. it would not normally be reasonable to ask for a new hearing date when it was known that the manager was going to be absent from work on business or on leave, unless it was possible for someone else to act for the manager at the hearing. The location and timing of any alternative hearing should be convenient to both employee and employer.

48. Both the employer and employee should prepare carefully for the hearing. The Employment Law gives representatives the right to a reasonable amount of **paid** time off during working time to prepare and represent an employee, but only where a fellow employee is being represented (i.e. they both work for the same employer). Where a union official who is not a fellow employee is acting as a representative, time off is a matter for agreement between the union official and his or her own employer.

49. The employer should ensure that, where necessary, arrangements are made to cater for any disability the employee or their representative may have. Where English is not the employee's first language there may also be a need for translation facilities. The employee should think carefully about what is to be said at the hearing and should discuss with their chosen representative their respective roles at the meeting.

50. Before the hearing, both parties should be informed of the identity and role of each person who will attend the hearing.

51. Representatives have an important role to play; the Employment Law requires the employer to permit the representative to address the hearing in order to;

(a) Put the employee's case;

(b) Sum up the case;

(c) Respond on the employee's behalf to any view expressed at the hearing; and

(d) Confer with the employee during the hearing.

The representative is not permitted to answer questions on behalf of the employee, address the hearing if the employee indicates that they do not wish them to do so, prevent the employer from explaining his or her case, or prevent any other person at the hearing from making a contribution to it.

52. Employers must be aware that the Employment Law provides that an employee who is dismissed for representing (or proposing to represent) another employee, and an employee who is dismissed for asserting the right to be represented in a disciplinary or grievance hearing, would be automatically protected against unfair dismissal.

53. Where an employer has failed to allow (or threatened not to allow) an employee to be represented, the Tribunal may award up to 4 weeks pay as compensation and quash any action taken by the employer in respect of the disciplinary or grievance matter (other than dismissal). In an unfair dismissal claim, the Tribunal may take into account an employer's failure to allow the employee to be represented in deciding whether a dismissal was fair or unfair.

Annexe: A model grievance procedure

First stage

Employees should put their grievance, preferably in writing, to their immediate line manager. Where the grievance is against the line manager the matter should be raised with a more senior manager. If the grievance is contested the manager should invite the employee to attend a hearing in order to discuss the grievance and should inform the employee of his or her right to be represented depending on the nature of the grievance. The manager should respond in writing to the grievance within a specified time (e.g. within five working days of the hearing or, where no hearing has taken place, within 5 working days of receiving written notice of the grievance). If it is not possible to respond within the specified time period the employee should be given an explanation for the delay and told when a response can be expected.

Second stage

If the matter is not resolved at Stage 1 the employee should be permitted to raise the matter in writing with a more senior manager. The choice of this person will depend on the organisation. The manager should arrange to hear the grievance within a specified period (e.g. 5 working days) and should inform the employee of the right to be represented. Following the hearing the manager should, where possible, respond to the grievance in writing within a specified period (e.g. ten working days). If it is not possible to respond within the specified time period the employee should be given an explanation for the delay and told when a response can be expected.

Final stage

Where the matter cannot be resolved at Stage 2 the employee should be able to raise their grievance in writing with a higher level of manager than for Stage 2. The choice of this person will depend on the organisation. Employees should be permitted to present their case at a hearing and should be informed of their right to be represented. The manager dealing with the grievance should give a decision on the grievance within a specified period (e.g. 10 working days). If it is not possible to respond within the specified time period the employee should be given an explanation and told when a response can be expected.

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APPENDIX 2

Uninterrupted Rest Days

Introduction

1. Under the terms of Article 2A of the Employment (Jersey) Law, 2003 (the 'Employment Law'), the Minister for Social Security is empowered to approve any code of practice for the purposes of that Law.

2. The provisions of this code of practice are admissible in evidence and may be taken into account in determining any question arising in proceedings before the Jersey Employment Tribunal (the 'Tribunal') or a court. Failure to observe any provision of an approved code of practice does not, of itself, render a person liable to any proceedings. Whilst every effort has been made to ensure that the summary of the relevant statutory provisions included in the code of practice is accurate, only the Tribunal and the courts can interpret the law authoritatively.

What counts as uninterrupted rest for the purpose of statutory rest day entitlement?

3. The Employment Law provides that rest days must be 'uninterrupted', but does not define the term or specify whether time spent on-call or standby counts as uninterrupted rest if the employee is not required to attend the workplace.

4. The requirement to provide 'uninterrupted' rest days could potentially cause difficulties for organisations that guarantee the provision of an uninterrupted service by using call-out and standby arrangements, such as the emergency services, as well as organisations that meet operational urgencies through shift work and standby arrangements.

5. A rest period is likely to be considered to have been interrupted if, either contractually, or due to business requirements, the employee is **required** by the employer to do one of the following on their rest day;

   (a) to be available at the employers' disposal to take a work related action away from the workplace (e.g. at home, on the telephone).
   (b) attend the workplace, or
   (c) be at or near the place of work.

6. The Employment Law provides that, if an employee's rest day is interrupted, compensatory rest must be made available within 14 days of the rest days that were interrupted. If a rest day is not interrupted, it counts as a 'rest day' and no compensatory rest would be required. A 14 day period is reasonable so that compensatory rest is provided at the earliest opportunity after the interrupted rest day, rather than extending into subsequent 14 day periods. This is mainly to ensure that benefit of rest breaks is not lost.

7. It would be considered reasonable to spell out, either in an employee's written terms of employment, contract or collective agreement, any special arrangements with regard to the interruption of rest days, in accordance with the provisions of this code of practice.

APPENDIX 3

Therapeutic Work

Introduction

1. Under the terms of Article 2A of the Employment (Jersey) Law, 2003 (the 'Employment Law'), the Minister for Social Security is empowered to approve any code of practice for the purposes of that Law.

2. The provisions of this code of practice are admissible in evidence and may be taken into account in determining any question arising in proceedings before the Jersey Employment Tribunal (the 'Tribunal') or a court. Failure to observe any provision of an approved code of practice does not, of itself, render a person liable to any proceedings. Whilst every effort has been made to ensure that the summary of the relevant statutory provisions included in the code of practice is accurate, only the Tribunal and the courts can interpret the law authoritatively.

Therapeutic work and the Employment Law

3. The notion of therapeutic work raises two particular issues in relation to the Employment Law -

   (i) The Employment Law does not refer to 'therapeutic work' or 'therapeutic workers' and makes no distinction between employees based upon disability or productivity.

   The term 'therapeutic work' is used to describe a number of arrangements whereby people who have difficulty functioning in the labour market are given the opportunity to undertake some form of work-like activity, for which they may receive some form of payment. The focus of such activities is usually rehabilitation, reintegration and training, rather than on producing 'outputs' for the employer.

   (ii) The basic criterion for determining whether a person has statutory rights under the Employment Law is simply - is he or she an employee?

   Article 1A of the Employment Law defines 'an employee' as 'a person who is employed by an employer'. A person is employed by another person if they are working under a contract of service or apprenticeship for that other person under which they undertake to personally do, or perform, work or services for

that other person, unless they are genuinely self-employed. A contract may be express or implied and may or may not be in writing.

Employees may not waive their statutory rights under the Employment Law. Any provision in a contract or relevant agreement is void in so far as it attempts to exclude or limit any provision of the Law or to prevent a person from bringing proceedings to the Tribunal.

The Tribunal

4. When the Tribunal or the courts consider whether a person is an employee for the purpose of the Employment Law, in the absence of further evidence being presented, the following factors, as set out in (a) to (d) are likely to be considered;

	Payment	**Mutual obligation**
(a)	Yes	Yes
(b)	No	No
(c)	Yes	No
(d)	No	Yes

(a) **Payment and mutual obligation** – Where there is a mutual obligation between the therapeutic worker and the therapeutic work provider, and the therapeutic work provider is paying a reward in return for that activity, it is likely that an employment contract exists between the two parties and the therapeutic worker would be an employee for the purpose of the Employment Law.

(b) **No payment and no mutual obligation** - If the therapeutic worker does not receive any payment (or any other benefit) from the therapeutic work provider and there is no obligation on the therapeutic worker to undertake the work, nor an obligation on the therapeutic work provider to provide the work, then there unlikely to be a contract of employment between the two parties. The therapeutic worker would not be an employee for the purpose of the Employment Law.

(c) **Payment without mutual obligation** - If a therapeutic worker receives payment from a therapeutic work provider, this may indicate a contractual relationship between the two parties, unless that payment is genuinely not linked to a mutual obligation between the parties, e.g. the therapeutic worker is not obliged to perform the work and the therapeutic work provider is not obliged to provide the work or make the payment.

(d) **Mutual obligation without payment** - Where there is a mutual obligation between the therapeutic worker and the therapeutic work provider to undertake and to provide work, but the therapeutic worker does not receive any payment from the therapeutic work provider, then the therapeutic worker is unlikely to be an employee for the purpose of the Employment Law. If the therapeutic work provider pays any expenses or 'ex gratia' amounts to a therapeutic worker, this may create a contract of employment unless, for example, there is no expectation of payment for the activity, or genuine expenses are paid that represent a fair and reasonable estimate of out-of-pocket expenses, (e.g. travel and subsistence) paid at a flat rate that represents average expenses.

5. In making a determination regarding the employment status of a therapeutic worker, the Tribunal would consider whether the nature of a relationship between two parties is that of a therapeutic work provider and a client, or that of an employer and an employee. This is particularly important in a case where an employment relationship may, on the face of it, appear to have been created through an arrangement that includes some form of payment and which gives the appearance of mutuality of obligation.

6. Where in a particular case the following four criteria are in evidence, it is likely to be reasonable to conclude that the person undertaking therapeutic work activity is a client rather than an employee:

(i) The activity is demonstrably focused on needs of the individual rather than needs of the organisation (however some benefit may be derived from the activity, such as selling any output to offset costs). The activity is intended and designed to serve the needs of the individual rather than the organisation.

(ii) The tempo of the activity, and of any output or delivery target, reflects the needs of the individual rather than those of the organisation.

(iii) The individual is referred to the activity and monitored/supported by a professional adviser (e.g. health/social care worker, Social Security officer, GP, social worker, occupational therapist, charity worker).

(iv) The arrangement is agreed with the individual and not made over his or her head.