WHITE PAPER **Jersey Employment Tribunal; Costs and Vexatious Claims**	

Issued by the Employment Forum on 30 April 2010

DEADLINE FOR RESPONSES – Friday 18 June 2010

PURPOSE OF WHITE PAPER

The Social Security Minister requested that the Employment Forum should seek comments on the employment legislation enforcement procedure in respect of 'vexatious' claims, and in particular, whether the Jersey Employment Tribunal should have the power to order one party to make a payment in respect of the hearing costs incurred by another party.

The intention of this White Paper is to seek an appropriate balance between deterring genuinely vexatious Tribunal claims, so that employers are not faced with excessive (financial and reputation) costs of defending a vexatious claim, whilst not allowing employers and their representatives to deter genuine claimants with threats of claims for costs.

SUMMARY

Section 1 – Background

Section 2 – Powers relating to costs orders in other jurisdictions

Section 3 – The current enforcement procedure

Section 4 – Suggested changes to the current procedure

Section 5 – The Proposal

Interested parties are encouraged to send their comments on any aspect of this White Paper to the Employment Forum, by Friday 18 June 2010, either by email, post or fax to;

Miss Kate Morel Secretary to the Employment Forum PO Box 55, La Motte Street St Helier, JE4 8PE	Telephone: 01534 447204 Fax : 01534 447446 Email: K.Morel@gov.je

To ensure that your comments are clear, the Forum would prefer to receive typed responses. If you wish to receive an electronic copy of this paper, please contact the Secretary, or download it from the States website -

www.gov.je/Government/Consultations/Current

SECTION 1 - Background

The following terms will be used in this White Paper;

A **"costs order"** may be made by an Employment Tribunal (in the UK and Isle of Man), at the request of one party to an employment dispute. The Tribunal may make an order requiring a claimant or a respondent to make a payment in respect of the hearing costs incurred by another party. This may include the cost of legal representation, preparation time for an unrepresented party, certain expenses of the parties and witness, government administration costs and costs ordered against a representative. Jersey's Employment Tribunal does not have the power to order a party to pay costs associated with the hearing.

The term **"vexatious"** claim is often used as a 'catch-all' term to refer to employees lodging claims that have little chance of success, that have no merit, that have been made maliciously, or with no intention of defending the case at the Tribunal hearing.

This paper will use the term vexatious to refer to the grounds on which the Royal Court may strike out a claim (in accordance with the Royal Court Rules 2004);

a) it discloses no reasonable cause of action or defence
b) it is scandalous, frivolous or vexatious;
c) it may prejudice, embarrass or delay the fair trial of the action, or
d) it is otherwise an abuse of the process of the Court.

The Forum would emphasize that it is important to be clear on the definition of 'vexatious' as truly vexatious claims are rare. A large number of employers consider the complaint/s made against them by former employees to be totally without merit. Likewise, most employees genuinely believe that they have a grievance against their former employer.

Previous Employment Forum Recommendation

In 2001, the former Employment and Social Security Committee approved, in principle, an early recommendation from the Employment Forum which set out an enforcement procedure for the proposed new employment legislation.

The Forum recommended the setting up of an Employment Tribunal that would hear individual and collective employment disputes. The Forum proposed that legal representation at hearings should be permissible, but

should not be not encouraged, in order to promote a non-legalistic and straightforward approach.

The Forum recommended that, as in the United Kingdom and Guernsey, costs of legal representation should not be awarded in any hearings, however costs could be recoverable in exceptional circumstances, such as, when claimant is thought to have brought a vexatious claim, or if a party has failed to comply reasonably with any request of the Tribunal.

The Forum made no recommendation as to whether there should be a limit to any costs recoverable and suggested that the advice of the Law Draftsman be sought, as well taking into account the outcome of an imminent UK Government review which was intended to promote conciliation and reduce litigation. The UK review had suggested that charges be introduced for the lodging of an employment tribunal application (which was strongly opposed by trade unions and voluntary sector organisations and was subsequently not introduced), and that the use and size of awards of costs should be increased in certain circumstances (see more details on the UK below).

Jersey's employment legislation was drafted to include the power for the Social Security Minister to make Orders in respect of Tribunal proceedings, including the power to make an Order for the award of costs or expenses. It was decided prior to enactment of the Employment Law that Orders would not be made in respect of Tribunal proceedings until the Tribunal was up and running and had established its own procedures regarding hearings (having regard to UK precedent). It was intended that these procedures could be formalised in law at a later stage, as required, rather than imposing potentially inappropriate legislation.

Representations to the Social Security Minister

Representatives of the hospitality industry have expressed strong concerns to the Social Security Minister over the past three years about the implications of the lack of the power to award costs to parties. The Minister decided that the Forum should consider whether the Employment Tribunal should have this additional power and (with the permission of the author(s)), the Minister has shared the concerns of that industry with the Forum, as summarised below.

Members of the Jersey Hospitality Association are concerned about "continuous vexatious claims made by employees" because they feel that claims are easily facilitated by the Employment Tribunal and JACS as both services are biased to the employee, leading a lack of confidence in the system and members sometimes being disinclined to use the services of JACS.

The Jersey Hospitality Association has stated that it is mindful of the percentage of claims that seem attributable to that industry; however the Association believes that a similar situation exists within other industries. This focus on the hospitality industry as failing in its employment administration is thought to have brought unwelcome publicity to the industry, without any reference to employees taking advantage of Law for financial gain; as one employer has described it, 'an employee cash machine'. The industry has stated that it 'is not prepared to accept the situation where perfectly good employers are dealt with, quite publicly, for erroneous and vexatious issues.'

One hospitality employer has noted that employees may have become aware that there is a potential financial benefit to be gained from making a spurious claim as some employers in that industry are members of insurance schemes that prefer to offer employees settlements as a compromise agreement, rather than fight a Tribunal case which could cost substantially more.

The Association recognises that the Employment Law has been amended to enable the Tribunal to reduce an award to an employee if it is found that the employee has contributed to their dismissal; the law now provides that the Tribunal may reduce an unfair dismissal award where the conduct of the employee has contributed directly to the dismissal; where, in advance of the hearing, the employee has rejected an offer from the employer for the maximum amount the Tribunal could award if it found the dismissal to be unfair; and the Tribunal may take into account other just and equitable circumstances that merit a reduced award.

However, the Association considers that if there is to be a genuine effort to build confidence in the service, it is necessary to give serious consideration to empowering the Tribunal to award costs against an employee if necessary. One member commented that this would 'go some considerable way to discouraging vexatious claims on the part of employees which, in many cases has dogged our administration function.'

The Minister considers that it is essential that the Forum independently considers representations from stakeholders in order to seek an appropriate balance between deterring genuinely vexatious claims without deviating from the purpose of the Employment Tribunal; to provide a non legalistic forum that is accessible to all employees and employers.

SECTION 2 - Powers relating to costs orders in other jurisdictions

Isle of Man

Applications for costs are very rare in the Isle of Man. It is thought that this may be due to the limited circumstances in which such an application may be considered by the tribunal. The Isle of Man's 2008 Employment Tribunal Rules establish the general principle that a costs order will not normally be made in any proceedings. The tribunal may however consider making an order for costs:

1. against a party who has acted vexatiously, abusively, disruptively or otherwise unreasonably, in bringing or conducting the proceedings (whether personally or through a representative).

2. where costs were incurred as a result of a full hearing or a pre-hearing review being postponed or adjourned, against a party who has not complied with an order.

3. against or in favour of a respondent who has not had a response accepted, relating to any part that he has taken in the proceedings.

There are three ways in which a costs order against a party can be determined:

- the tribunal may specify the sum payable, up to a maximum of £500;
- the parties may agree the sum payable between themselves;
- the tribunal may order the costs to be determined by way of detailed assessment in the High Court (e.g. where costs exceed £500).

Applications for costs generally only arise where one of the parties is legally represented. The party against whom the costs order is to be made has the opportunity to make representations as to why an order should not be made. The tribunal is required to take into account a party's ability to pay when determining whether or not to make a costs order against him and in setting the amount and must provide written reasons for making a costs order, if requested to do so.

In some circumstances the tribunal may make a "wasted costs order" against a party's representative, requiring the representative to pay the costs incurred by any party (including his own client) as a result of the representative's misconduct. The rules exclude any representatives who are not acting for profit with regard to the proceedings (e.g. a CAB adviser).

"Wasted costs" are costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any representative; or where there has been such an act or omission after the costs were incurred and the tribunal considers it unreasonable for that party to pay them. The representative has the opportunity to make representations as to why an order should not be made and the tribunal may take into account the representative's ability to pay.

Statistics on the number and value of costs orders are not kept by the Isle of Man Tribunals Service as instances are so rare. Approximately one or two orders for costs are made each year. In addition, approximately one or two applications for costs per year are refused by the tribunal.

In 2009, costs were ordered in only one very complex and unusual case. Costs of £1,000 were ordered to be paid jointly by two employees who brought claims jointly against their former employer. The employer had argued that evidence brought by the employees could have been brought earlier and the tribunal agreed. There were a small number of other applications for costs during 2009 but none were successful. Applications for costs have not increased since the rules were changed in 2008, which for example, introduced the ability to make costs orders against representatives.

UK

As in the Isle of Man, UK employment tribunals have the discretion to order costs where it is of the opinion that the party (in bringing the proceedings) or the party or their representative (in conducting proceedings) has acted vexatiously, abusively, disruptively or otherwise unreasonably, or that the bringing or conducting of proceedings has been misconceived **and** the tribunal considers that it would be appropriate for the paying party to pay costs to the receiving party in those circumstances.

A claim may be regarded as "vexatious" if, for example, it is brought by an employee simply to spite his or her employer. Similarly, a claim may be regarded as "misconceived" if it has no reasonable prospect of success. As regards what is "unreasonable" conduct, tribunals have a wide discretion in determining whether this test has been met. There is, for example, no requirement for the tribunal to identify a link between the conduct of the paying party and any costs actually incurred by the receiving party.

A costs award can be made to cover legal costs for parties who were legally represented at the time the case was heard. A preparation time award covers time spent preparing for a case for a party who isn't legally represented. Wasted costs orders are made directly against a paid representative on

account of their own unreasonable conduct (but only representatives who are acting in pursuit of profit).

In practice, costs orders are rarely made. They usually happen when the applicant withdraws the claim at the very last minute, or when one party fails to attend a hearing without advance warning to the tribunal. Costs may also be awarded if a case is completely without merit, or if one party prolongs the hearing unnecessarily by bringing up irrelevant matters or calling too many witnesses.

A 2001 UK Government review, which was intended to promote conciliation and reduce litigation, suggested increasing the use and size of awards of costs in certain circumstances. The amendment introduced an express power to take into account the unreasonable behaviour of a party's representative and a new power to make costs orders because an application is 'misconceived'.

The limit on costs that the tribunal may award was increased from £500 to £10,000. A tribunal may order that costs be subject to a detailed assessment by a county court, in which case costs awarded may exceed £10,000 and the parties may also agree that costs of more than £10,000 are to be paid.

In the reporting year 1999/2000, 103,935 Tribunal applications were registered and costs were awarded in 407 cases, of which 291 were against the respondent (i.e. the employer) and 116 were against applicants. This compares to 151,000 claims being accepted in 2008/9 and in the same period, costs were awarded in 367 cases (not including costs awarded for waste or preparation). The median award for costs was £1,100, the average award £2,470 and the maximum award was £25,000. (See Appendix 1 for more detail on the UK figures for 2008/9.)

In March 2004, the UK Citizen's Advice Bureau published a paper setting out its concerns and evidence in relation to *"the widespread use of unjustified threats by employers or their legal representatives to seek costs against employment tribunal applicants, with a view to intimidating them into withdrawing the claim."* The report states that the use of such tactics, and their potential impact on applicants with valid cases, had increased significantly since 2001 when the UK government increased the maximum amount of costs that may be awarded by a tribunal from £500 to £10,000. Appendix 2 provides the examples set out in the CAB report of cases where orders for costs were made in the UK.

Since that report was released, there is reported to have been a decline in the number of complaints about the making of costs threats by employers'

lawyers in the UK, and the actual number of costs awards against the applicants is fairly small.

Guernsey

Guernsey's Employment Protection (Recoverable Costs) Order, 2006 came into force in March 2006. The Order prescribes the maximum amounts of witness costs and other costs which may be awarded by the Employment and Discrimination Tribunal in favour of any party to proceedings before it under the Employment Protection (Guernsey) Law, 1998. Identical Orders and amounts of costs apply in relation to Guernsey's Sex Discrimination Law.

The general rule is that parties bear their own costs, which is in keeping with the principles of States Resolution. The Order provides that no costs may be recovered by a party in respect of the costs, fees and expenses of his Advocate or other legal adviser. Some costs, fees and expenses however may be recovered by a party; witness costs, administration costs and the party's own costs.

The following witness costs may be recovered;

1) No more than the expenses actually and reasonably incurred;
   a) for board and lodging overnight when a witness must be away from home in order to attend, and
   b) expenses in travelling to and from the place of the hearing for the purpose of attending to give evidence.
2) For loss of earnings, not exceeding £100 per day,
3) Where the witness is an expert witness, £60 per hour, for attending to give expert evidence and £600 for work in connection with the preparation of such evidence.

The Commerce and Employment Department may recover;

1) £20 in respect of the issue of each witness summons
2) A maximum of £100 per day in respect of the costs, fees, expenses and allowances of the Tribunal and the members thereof, and
3) A maximum of £100 per day in respect of the costs, fees and expenses of the holding or conduct of the hearing (other than the costs, fees, expenses and allowances of the Tribunal and the members thereof).

The maximum costs which may be recovered by a party are;

1) No more than the expenses actually and reasonably incurred;
   a) for board and lodging overnight when a witness must be away from home in order to attend, and

b) expenses in travelling to and from the place of the hearing for the purpose of attending to give evidence.

2) £100 in respect of his costs, fees and expenses reasonably incurred in the preparation or presentation of his case.

It is very unlikely that a Tribunal will award costs without a request from a party, however in one case the Tribunal awarded a small amount to the employee because the employer had tried to defend an indefensible claim.

Costs have only been awarded in about six cases in the past 11 years and have never been awarded in respect of a 'vexatious' or 'frivolous' claim. This is thought to be because the Tribunal will generally have disposed of the claim at an early stage of the proceedings, before significant costs have been incurred by the parties. These cases are also more likely to be 'conciliated' with a small settlement from the employer, or a withdrawal by the applicant during conciliation as they realise their case is weak.

In the past 11 years, it is estimated that three Tribunal cases in Guernsey may have been considered ‘vexatious’. Although some claims may be misguided in terms of whether the employee has been 'unfairly treated' as opposed to being 'unfairly dismissed', most applicants have a genuine belief that they have suffered a wrong. A claim out of naivety is not the same as a vexatious claim and a tribunal would not penalise such an applicant by awarding costs.

In Guernsey’s experience, ‘vexatious' claims are generally made by applicants with a weak case who are legally represented, in that the lawyer is hoping to obtain a settlement for their client through the conciliation process, by placing the burden on the employer having to defend the claim. Often these settle in conciliation, so the issue of costs does not come before the Tribunal.

The amounts that can be awarded are intentionally small to reflect the States policy that the process should remain available to all people, without fear of costs being awarded against them, and to ensure that as far as practicable, the process is as informal, non-legalistic and inexpensive for both parties.

SECTION 3 – The current enforcement procedure

The Forum has considered in detail the existing procedure for the submission and administration of Employment Tribunal claims. *If you have any comments on the existing procedure, please include these in your response to the Forum.*

The Tribunal application – Once received by the Tribunal, the initial application will be acknowledged (in writing) and a copy sent to the employer

asking for a response. When the response form is received, it is acknowledged (in writing) and a copy is sent to the employee (or former employee). Copies of both forms are then sent to JACS, unless the parties indicate they do not wish to conciliate. A Conciliation Officer then contacts both parties individually to offer Conciliation.

If the conciliation process is successful and a conciliated settlement is reached between the parties, then the case is closed and no further action is taken. The option to conciliate remains open to the parties throughout the process until conclusion of the hearing. IT is possible for a party to withdraw from the case process at any time.

If one or both parties are unwilling to take part in conciliation, or if the conciliation process fails to reach a settlement between the parties, a Tribunal is appointed to hear and determine the outcome of the claim at a formal hearing.

Tribunal application forms reflect the provisions of the Employment Law and are often presented with mistakes or incongruities. The Chair and Deputy Chair are legally qualified and they deal with these issues as they arise. This is essential to the consistent acceptance of applications to the Tribunal system, prior to submission of an application to JACS for conciliation.

JACS provide a good filter for Tribunal applications. During 2009, 163 Tribunal claims were passed to JACS by the Tribunal, 102 of which were resolved by conciliation (71%). JACS has advised the Forum that only around one in a hundred people refuse conciliation via JACS.

Interim and Directions hearings – These hearings are generally convened at short notice because they are necessary for the proper management of cases. Sometimes the Chair will sit alone, however a panel may be convened if there are facts to be identified or the hearing involves the exercise of a discretion (e.g. deciding whether to accept a late application for unfair dismissal).

Directions hearings are a type of Interim hearing to deal with practical matters. These are generally managed by the Chair alone and are for the purpose of giving directions (orders) on administrative matters involved in the due process of the case, for example, on the time limits for the exchange of information between the parties in the lead up to the hearing.

The majority of Tribunal cases go ahead without an Interim hearing. A decision to convene an Interim hearing may come about because:

- The Chair identifies that there is something wrong with the initial application under the Law. The Chair will flag the issues and call a hearing. The Tribunal Secretary will warn the parties of the defect and try to resolve it without the necessity for a hearing, where possible.

- During the administration of a case, it is clear to the Tribunal Secretary that the parties disagree on a particular point and the Chair will convene an Interim hearing to deal with that particular issue (case management) which may then result in a Directions hearing.

- An employer (usually unrepresented) asks for a hearing to be held to strike out the employee's claim on the basis that it is 'scandalous' or without merit. JACS will recommend that an employer seeks an interim hearing if they believe that a claim may be vexatious.

- A lawyer acting for an employer requests an Interim hearing to identify heads of claim and to ask for specific Directions to be made. These are generally requested at appropriate points in the administration of the case.

The Tribunal's self imposed regulations (which are not Law, but are followed as a matter of practice) specify the procedure in relation to holding Directions hearings and Interim hearings (see Appendix 3). The Employment Tribunal 'Users Guide', which is provided to parties, states that a party may request a case management hearing at any time by contacting the Secretary to the Tribunal. These documents are publicly available on the Tribunal's website[1].

Details of the option to request an Interim hearing are included in the Tribunal Secretary's letter acknowledging receipt of an employers response form, which states that "an Interim hearing may be held at any time after a complaint has been received for the purpose of dealing with any interim issue such as striking out, dismissing or amending any part of a claim." The option is also specified in the letter notifying both parties of the main hearing date.

Striking out – Article 89 of the Employment Law gives the Tribunal powers equivalent to the Royal Court to strike out a claim on specified grounds (see page 2 which specifies the grounds). An employer who wishes to strike out the employee's complaint must apply to the Tribunal. The Tribunal tends to deal with strike out applications at Interim hearings.

The Tribunal is most likely to strike out a complaint because it has no reasonable prospect of success in that the complaint lacks the necessary legal substance to proceed, or the party does not meet the criteria required by

[1] www.jerseyemploymenttribunal.org

the Law to bring the action, for example, the individual was not an 'employee' as defined by the Employment Law.

The Tribunal may strike out a claim where the party bringing the claim does not respond to further correspondence in regard to the process of the hearing. Prior to striking out such a claim, the Tribunal Secretary will write to the party advising them that their claim will be struck out if they do not contact the Tribunal within a specified time period.

Failure to attend - There are very few cases where one party does not attend a hearing. Of approximately 85 cases listed for hearing during 2009, only 6 or 7 employees did not attend the hearing. Conversely, there were 2 or 3 instances where the employer did not attend the hearing.

During the administration of a hearing, the Tribunal Secretary keeps in touch with the parties to ensure that they attend and tries to identify situations where he feels that they might not attend. However, a party might decide not to attend a hearing for any number of reasons, such as;

- the party feels intimidated by the process
- the employee feels intimidated by the employer
- the employee has moved on from the incident
- the party has moved away from the Island and not informed the Tribunal Secretary.

In the absence of one party, the Tribunal will either strike out the case, or attempt to deal with the case in the party's absence on the basis of the information contained in the application and response forms.

SECTION 4 – Suggested changes to the current procedure

A number of potential solutions have been suggested to the Forum in order to reduce vexatious Employment Tribunal claims. If you have any comments on the following suggestions, please include these in your response to the Forum.

JACS to validate Tribunal applications – An employers' association has suggested that JACS should have greater powers to prevent the escalation of vexatious claims to the Tribunal.

Due to the confidentiality of the service, JACS does not discuss an employee's complaint with an employer, unless the employee gives their permission. Likewise, JACS would not discuss any advice given to an

employer with the employees of that business, without the permission of the employer. There is concern that this could lead to a situation where JACS has assisted with a Tribunal application on the basis of false information given by that employee (e.g. claiming not to have been given a contract of employment or pay slips).

It has been suggested by the employers' association that if employees are **required** to allow JACS to discuss any grievance with the employer, prior to submitting an application to the Tribunal, there may be early settlement by negotiation and consent. This could be achieved by providing that the Tribunal will only accept an application if it is accompanied by a validating certificate from JACS, stating that JACS has discussed the grievance with both parties and is satisfied that there is a legitimate case to answer. JACS would then refuse to validate a Tribunal application if the employee refused to allow JACS to confer with the employer.

Both JACS and the Employment Tribunal find this suggestion unacceptable as it would remove the neutrality of JACS. It is not the role of JACS to decide whether a claim may proceed to the Employment Tribunal, nor can JACS give legal advice; it is for the Employment Tribunal (with its legally qualified Chairman and Deputy Chair) to determine whether there is a legitimate case to answer.

The Forum does however consider that there may be some benefit in requiring an employee to confirm (via a validating certificate if appropriate) that they have taken the advice of JACS (or other appropriate adviser) prior to submitting an application to the Tribunal. The employee may of course decide not to take any advice provided.

A lodging fee – The same employers' association has also suggested that the Tribunal could require a small fee for a claim to be lodged, around £50-100. The fee would be repaid to the applicant if their claim is successful. If the claimant does not win their case, the fee would be given to the employer as a contribution towards their costs. In genuine cases of hardship, the Tribunal Secretary would have the power to waive the fee if he was satisfied that there was a genuine case to answer (as certified by JACS).

Having discussed this option with JACS and the Employment Tribunal, the Forum is concerned that even a small lodging fee would be prohibitive; it denies people their rights and is likely to discourage genuine claims. A fee of £50 is a significant sum to an individual who may have lost their job, or has not been paid wages owed. Any less than £50 may still be restrictive to low paid applicants, however is unlikely to be a deterrent to a truly vexatious claimant.

Power to award costs for legal representation – In order to address the concerns that have been raised with the Minister, it would be necessary to give the Tribunal the power to award costs for legal representation. The power to award other minimal costs (e.g. witnesses travel expenses, as in Guernsey) is unlikely to address concerns about the cost of defending a Tribunal claims or deter truly vexatious claims.

If legal costs were available, it would be necessary to introduce tribunal rules and procedures on how costs can be applied and awarded, resulting in the process becoming more legalistic as more professionals become involved in the conduct of cases. The Tribunal has advised the Forum that currently around one in three employers are legally represented at hearings. A costs award of up to £10,000 may be attractive to a junior lawyer or a small legal practice, which is likely to result in an increase in the number of legally represented parties, which is contrary to the purpose of the Tribunal.

The Tribunal is intended to be a quick, accessible, straightforward means of resolving disputes; there is a risk that the power to award costs will destroy that ethos. The Tribunal's rules and procedures have been deliberately kept to a minimum so that parties are not discouraged from attending without legal representation. The Tribunal actively encourages parties to attend without a lawyer and will guide the process to ensure that there is a fair hearing.

Since October 2009, the Tribunal has had the power to reduce an unfair dismissal award if it considers that the employee has contributed in some way to his dismissal. The Tribunal may take into account other just and equitable circumstances that merit a reduced award, so any element of malice in the claim may be reflected in the ensuing reduction. The Tribunal may also reduce an unfair dismissal award where the employee has refused an offer made by the employer, before the commencement of proceedings, for an amount equal to the maximum amount that the Tribunal could award in that case.

As noted by the UK's Citizen's Advice Bureau, the threat of costs being incurred by a party can be used as a form of intimidation and thus interfere in the due process of a case, particularly if there is no opportunity to discuss in advance with an employee whether their claim is likely or unlikely to succeed.

For these reason the Forum believes that the Tribunal should not have the power to award costs in respect of legal representation.

If it were to be decided that the Tribunal should have the power to award costs to a party, the Forum would wish to consider in more detail the specific circumstances in which the Tribunal may consider awarding costs (e.g. where a party has been misconceived in bringing proceedings, or has caused

detriment to the other party by delaying proceedings), what actions the Tribunal must take before making an awards for costs (warning the party of the potential award, holding an Interim Hearing), what other types of costs may be awarded (preparation time, parties and witness expenses and costs ordered against a representative), and the maximum total costs award that should available.

SECTION 5 – The Proposal

It had been suggested that the Tribunal should have the power to award costs to compensate employers who are forced to incur expense and inconvenience because of what they perceive as spurious claims made against them by former employees, as well as where employees do not turn up for the Tribunal hearing. There is a concern that employees have 'nothing to lose' by submitting an application to the Tribunal. The Forum appreciates that there may a considerable amount of work and cost for an employer involved in presenting a case, even if it is eventually struck out, particularly for a small business.

JACS and the Employment Tribunal have advised the Forum that although a small number of employees may take a claim to the Employment Tribunal, despite having been made aware that they have little chance of success, there are very few instances of truly vexatious claims, where the applicant takes a claim maliciously or without cause, solely with the intention of embarrassing or inconveniencing their previous employer.

Evidence from other jurisdictions shows that costs are very rarely awarded, and that applications for costs tend to arise only when one of the parties is legally represented. In addition, when costs are awarded by a tribunal, they are very rarely in respect of a vexatious claim. In the UK, for example, costs tend to be awarded when one party withdraws from or fails to attend a hearing at short notice or without advance warning to the tribunal. In Guernsey, costs have never been awarded in respect of a vexatious claim as such claims are generally disposed of early in the process.

The desired outcome is that genuinely vexatious claims are avoided, so that employers are not faced with undue (financial and reputation) costs of defending a claim, whilst ensuring that employers and their representatives do not deter genuine claimants with threats of claims for costs.

The Forum considers that a reasonable system to dispose of such claims is also already in place in Jersey. It is clear that the Tribunal is already taking active steps to ensure that only cases relevant to the Law proceed to a

hearing to reduce instances of vexatious claims and has methods of keeping down parties' costs.

The Forum proposes the following improvements to the existing enforcement mechanisms. *If you have any comments on the proposals, please include these in your response to the Forum.*

1. Employees must continue to be encouraged to use the free and impartial services of JACS and JACS should continue to provide a neutral role. The Forum proposes that when submitting an application to the Tribunal, an employee should be required to confirm (via a validating certificate if required) that they have taken professional advice from JACS, or another relevant adviser (e.g. a lawyer or Citizens' Advice Bureau adviser). The Forum notes that although currently only 1 in 100 employees refuse conciliation via JACS, this situation may change in the future.

2. The Forum understands that the Tribunal has begun to undertake more Interim and case management hearings as cases have become more complex and proposes that the Tribunal should continue to use the Interim hearings procedure to deal with specific issues that need to be decided before the main hearing and to strike out a complaint where it has no reasonable prospect of success.

3. The Forum understands that the majority of cases proceed directly to a Tribunal hearing with no request for an Interim hearing. The Forum proposes that awareness should be increased of the option for either party to request an Interim hearing at an early stage in the process. This information is already included in the Tribunal's correspondence with employers, however the Forum feels that it would be beneficial for this information to be given more prominence in correspondence, as well providing more detail in the Tribunal Users Guide to explain the purpose of such a hearing, giving examples of the types of issues that may be dealt with and the potential outcomes of such a hearing. JACS may also be able to raise awareness in their literature and training sessions.

4. The Forum proposes that the Tribunal should publicise and clarify the level of procedural support that it can provide to non-represented parties (both employers and employees) throughout the application process and at a Tribunal hearing and also proposes that employers could be encouraged not to bring a legal representative in simple cases in order to reduce their costs.

WHITE PAPER **Jersey Employment Tribunal; Costs and Vexatious Claims**	

The Forum would be grateful to receive your comments on any aspect of this White Paper.

Please send your comments to the Employment Forum, by **Friday 18 June 2010**, either by email, post or fax to;

Miss Kate Morel
Secretary to the Employment Forum
PO Box 55
La Motte Street
St Helier
JE4 8PE

Telephone: 01534 447204
Fax: 01534 447446

Email: K.Morel@gov.je

*The Forum will be holding a public workshop giving interested parties the opportunity to discuss this issue. The Workshop will be held on **Wednesday 9 June** 2010 at the Employment Tribunal premises, First floor, Trinity House, Bath Street. Please email K.Morel@gov.je if you wish to attend, or return the enclosed reply slip.*

Appendix 1 - Employment Tribunal awards for costs in the period 2008/9 (not including costs awarded for waste or preparation)

	No. of Cases awarded to Claimant	**No. of Cases awarded to Respondent**
Costs to -		
< £200	9	27
£201-£400	20	21
£401-£600	16	24
£601-£800	6	20
£801-£1000	8	29
£1,001-£2,000	21	46
£2,001-£4,000	8	45
£4,001-£6,000	5	19
£6,001-£8,000	2	14
£8,001-£10,000	4	18
£10,000+	3	2
All	**102**	**265**

Appendix 2 - Legal Action Group (Website: www.lag.org.uk) - Examples of Case Histories as reported by CAB, March 2004

Examples of costs threats by employers' representatives

1. **Mr D** claimed unfair dismissal and was initially acting for himself. The employer's representative wrote to him threatening him with costs, as follows:

> *"It is clear from the facts that your claim is wholly without merit and is bound to fail. Therefore, we hereby place you upon notice of costs as we are of the view that this claim is frivolous and vexatious and is bound to fail. For the avoidance of doubt, if you withdraw your claim, we shall not pursue you for costs."*

Mr D subsequently approached his local law centre, which offered to represent him at the hearing. The Employment Tribunal unanimously decided that he had been unfairly dismissed, and awarded him the maximum compensation of £50,000.

2. **Mr W** made a claim for unfair dismissal and his representatives calculated that he could expect to receive total compensation of approximately £33,000 if his case was successful. While settlement negotiations were taking place through ACAS, the employer's solicitors wrote to his representatives making an offer of £8,000 in full and final settlement of the case. The letter stated the following:

> *"We have advised our client that, both in view of the merits of your client's claim and how the settlement proposal is broken down, the amount sought by your client is unrealistic…... If your client rejects this offer [of £8,000] and fails to be awarded more than the amount of this offer, we reserve the right to bring this letter to the attention of the Tribunal as evidence of your client's unreasonable conduct in this case and will request that an Order for costs is made against your client."*

The representatives were able to reassure Mr W that the Employment Tribunal does not have any 'payment into court' procedure, as the solicitors wrongly implied. The case has yet to be resolved.

Examples of cases where costs orders were made

6. **Mr G's** Employment Tribunal claim was adjourned because the hearing, listed only for one day, could not be completed. A date was fixed for the resumed hearing but Mr G's representative, Mr E, an independent law consultant, did not attend owing to illness. Another date was fixed but again Mr E did not attend, this time because he was taking part in another tribunal hearing. At short notice he arranged for a colleague take his place who knew little about the case. Mr G was very unhappy about this arrangement and asked the tribunal for an adjournment so that he could find alternative representation.

   The tribunal granted the adjournment and, although noting Mr G's 'visible distress' about what had happened, awarded costs of £500, apparently assuming that Mr E would meet this. However, when nine months later Mr E had still not paid the costs, Mr G found himself threatened with County Court action by the solicitors representing the employer.

7. **Mrs T** brought a claim for race discrimination against her employer, a local authority employer. She also cited her managers as co-respondents to the case. Just before the start of the hearing, one of the managers, Mr P, came up to her in the waiting room and offered a sincere apology for his discriminatory behaviour towards her. Mrs T felt that she should accept Mr P's apology and withdraw her claim against him. The Employment Tribunal indicated to her representatives that no adverse consequences would arise from her doing this.

   Consequently, Mrs T instructed her representatives to withdraw the application against Mr P. She was very surprised and upset when the tribunal made a costs order of £500 against her on the grounds that part of her claim had been withdrawn at the last minute. An appeal has been made against the order.

Appendix 3 - The Employment Tribunal's self imposed regulations (which are not Law but are followed as a matter of practice) specifying the following procedure in relation to holding Directions hearings and Interim hearings:

Directions hearing

1. The Chairman may hold a Directions hearing at any time after a complaint form has been received.
2. A Directions hearing shall deal with the management of the case and/or the proceedings. The Chairman may make such case management directions as he considers appropriate.
3. Any party may apply for a Directions hearing. Such an application shall be in writing and submitted to the Secretary and copied to the other party or parties.
4. The Chairman may give Directions without hearing the parties, or may convene the parties to a Directions hearing.
5. Directions hearings shall be held in private unless the Chairman decides otherwise.

Interim hearing

1. The Chairman or the Tribunal may hold an Interim hearing at any time after a complaint has been received.
2. An Interim hearing shall deal with matters relating to and determining rights between parties. Judgement may be given on any interim issue such as striking out or dismissing all or any part of a claim.
3. Any party may apply for an Interim hearing. Such an application shall, other than in special circumstances, be in writing and submitted to the Secretary and copied to the other party or parties.
4. The Chairman may convene the parties to an Interim hearing.
5. The Chairman shall determine whether an Interim hearing shall be heard in public of private and whether he shall deal with it alone or by convening the Tribunal.