SUMMARY OF RESPONSES AND RECOMMENDATION

Jersey Employment Tribunal; Costs and Vexatious Claims

Issued by the Employment Forum on 20 December 2010

CONTENTS

SUMMARY

The Social Security Minister asked the Employment Forum ('the Forum') to review the employment legislation enforcement procedure in respect of 'vexatious' claims, and in particular, whether the Jersey Employment Tribunal ('the Tribunal') should have the power to order one party to make a payment in respect of the costs incurred by another party.

The Forum published a White Paper on 30 April 2010 setting out proposals for what it believed to be 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 deterring genuine claimants because of concerns about claims for costs.

The Forum was of the view that with some minor improvements to the existing procedure, it would not be necessary to introduce the power to award costs at this time. The Forum made four proposals for improvements to the procedure;

1. Employees should be required to confirm that they have taken advice from the Jersey Advisory and Conciliation Service (JACS), or another relevant adviser, when submitting an application to the Tribunal.

2. The Tribunal should continue to use the Interim and Directions Hearings (in the rest of this document referred to as together as '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. Awareness should be increased of the option for either party to request an Interim Hearing at an early stage in the process, giving this information more prominence in correspondence and providing more detail of the purpose of such a hearing.

4. The Tribunal should publicise and clarify the level of procedural support that it can provide to non-represented parties and employers could be encouraged not to bring a legal representative in simple cases in order to reduce their costs.

In addition, the Forum described and considered other suggestions to address vexatious claims that had been put forward including; an application lodging fee, a requirement for JACS to validate whether a claim is vexatious or not, and the power for the Tribunal to award a winning party legal and other costs.

Responses to the White Paper revealed that the subject is wider and more complex than the Forum had originally envisaged. As well as reconsidering other available options, the Forum has revised its proposals in providing this recommendation to the Social Security Minister.

SECTION 1 - Background

It had been suggested to the Social Security Minister that the Jersey Employment Tribunal should have the power to award costs to compensate employers who are forced to incur expense and inconvenience because of 'spurious' claims made by former employees, as well as where employees fail to attend the Tribunal hearing.

Concerns have been expressed that employees have 'nothing to lose' by submitting an application to the Tribunal. The Forum appreciated that there could be 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 had 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.

Prior to consultation, the Forum believed that a reasonable administrative system to dispose of such claims is already in place, with no need to

introduce a power to award costs. The purpose of the Forum's White Paper was to propose a number of minor improvements to the system so that genuinely vexatious claims could be identified earlier in the process, so that employers are not faced with undue costs of defending a claim, whilst not deterring genuine claimants because of concerns about claims for costs.

Other jurisdictions

Evidence from other jurisdictions shows that costs are very rarely awarded in employment tribunal proceedings and that applications for costs tend to arise only when one of the parties is legally represented.

When costs are awarded by a tribunal, they are rarely awarded 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 because such claims are generally disposed of early in the process.

UK and Isle of Man tribunals may (and do on occasion) make an order requiring a claimant or a respondent to make a payment in respect of the costs incurred by another party, including 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.

In Guernsey, some costs, fees and expenses may be recovered by a party; including witness costs, administration costs and the party's own costs, however legal costs may not be recovered.

Jersey's existing administration and enforcement procedure

- **Conciliation**

When an application is received by the Tribunal and the employer has submitted its response, copies of both forms are 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 the conclusion of the hearing. It is possible for a party to withdraw from the 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.

Of the Tribunal applications that had been referred to JACS during 2009, 71 percent of cases were resolved by conciliation. Only around one in a hundred people refuse conciliation via JACS.

- **Interim Hearings**

These hearings are generally convened to manage cases and deal with preliminary issues. The majority of Tribunal cases do not involve an Interim Hearing. A decision to convene an Interim Hearing may come about for a number of reasons, including that an employer has requested a hearing to strike out the employee's claim on the basis that it is 'scandalous' or without merit. JACS Officers will recommend that an employer seeks an Interim Hearing if a claim is believed to be potentially vexatious.

The Employment Tribunal 'Users Guide', which is provided to all 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].

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 Interim Hearings. In addition, details of the option to request an Interim Hearing are included in the Tribunal Secretary's letter acknowledging receipt of an employer's response form. The letter 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.

- **Strike out**

By virtue of Article 89 of the Employment (Jersey) Law 2003 ('the Employment Law'), the Tribunal has powers equivalent to the Royal Court to strike out a claim on specified grounds, which are; it discloses no reasonable cause of action or defence; it is scandalous, frivolous or vexatious; it may

[1] www.jerseyemploymenttribunal.org

prejudice, embarrass or delay the fair trial of the action, or; it is otherwise an abuse of the process of the Court. The Tribunal has also, in several of its judgments, set out how and when it will consider applications to strike out.

An employer who wishes to strike out an 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 the Employment 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.

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. There were also 2 or 3 instances where the employer did not attend the hearing. 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.

- **Costs awards**

Jersey's Employment Tribunal does not have the power to order a party to pay costs associated with the hearing. The Employment Law gives the Social Security Minister the power to make further legislation (Orders) in respect of Tribunal proceedings, including the power to award 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 had bedded in and established 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.

SECTION 2 – Consultation methods

Prior to consultation, the Social Security Minister had presented the Forum with the comments that he had received from representatives of the Jersey

Hospitality Association ('the JHA') (with their permission) about the lack of the power to award costs to parties. The Forum also discussed the issues with the Director of JACS and the Deputy Chair of the Tribunal. These comments assisted the Forum in preparing the White Paper.

The Forum published its White Paper on 30 April 2010 seeking responses via public consultation. Copies were circulated to the Forum's consultation database of approximately 150 individuals, organisations and associations. The White Paper was also available on the States website.

Thirteen written responses were received from a range of respondents (listed at Appendix 1);

3	Trade union/staff association
1	Advisory body
3	Employer
2	Employers association/trade representative body
1	Legal
2	Other
1	Anonymous

The Forum held a public workshop on this subject on 9 June 2010 which was well attended by a range of stakeholders including employers, trade unions and employers associations from relevant industries, including Hospitality, Finance, Public sector, Retail, Legal and Advisory. Some of these stakeholders also submitted a written response.

SECTION 3 – Summary of responses

Overview of responses

The Forum's White Paper set out four proposals with a view to improving the existing enforcement and administrative mechanisms. Proposal 1 was not supported by most of the respondents. Proposals 2, 3 and 4 were generally supported by most respondents. More details on the responses to each proposal are given below.

The White Paper also set out a number of other suggestions to deal with vexatious claims that had been proposed prior to consultation, but which had been rejected by the Forum due to their disadvantages. Some respondents however supported the suggestions for further legislative measures to deter vexatious claims. These included; the power to award limited costs (including legal costs) on specified grounds and the power to require payment of lodging fee or deposit when submitting a claim.

SUMMARY OF RESPONSES AND RECOMMENDATION

Jersey Employment Tribunal; Costs and Vexatious Claims

Following is a summary of the responses and comments received in regard to each of the Forum's proposals and the potential alternatives.

Proposal 1 *- The Forum proposed 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).*

Those who attended the public workshop in general did not agree that an employee should be required to confirm by way of a validating certificate that they have taken professional advice. The benefit of such a certificate was unclear and most agreed that it 'threatened' the JACS service in terms of confidentiality.

This view was supported by the majority of the written responses, including JACS themselves, who said, *"a 'validating certificate' would not disclose the advice given to a party, merely that they had attended our offices – therefore, it appears that there could be little merit in such a 'certificate'. Some employees and employers seek advice anonymously prior to submitting a Tribunal claim and will not have the requisite certificate, yet have sought advice."*

A finance industry employer commented that the requirement to provide a validating certificate *"could be seen as a breach of confidence and may deter employees with genuine claims from seeking advice."*

The Royal College of Nursing (RCN) commented that *"it is difficult to see how the suggestion that the claimant should certify that they have taken advice from JACS, or another appropriate advisor, would be an effective deterrent for vexatious claims, if the claimant then remains at liberty to reject that advice.*"

Some respondents were not strongly opposed to the proposal, however felt that it would be unnecessary, including a law firm that agreed that there might be some merit in requiring a claimant to confirm that they have taken advice from JACS or another adviser, however *"we do not consider that this should be a necessary component of the submission of a claim."*

Unite had *"no issues"* with the suggestion that an employee should be required to confirm that they have taken the advice of JACS or another appropriate adviser, *"as long as the status of this document is such that it cannot be used later in an employment tribunal to the detriment of a workers case against their employer."*

The Jersey Motor Trades Federation supported the validation of applications by JACS. *"JACS should have greater powers to prevent the escalation of vexatious claims to the Tribunal. However we recognise that a claimant should have the right to proceed, even if against advice."*

Both JACS and the Employment Tribunal find this suggestion unacceptable as 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.

Noting that any requirement to produce a validation certificate would not give JACS any power to prevent the escalation of vexatious claims to the Tribunal, the Forum concludes that the requirement for employees to certify that they have taken professional advice prior to submitting an application is not supported by the responses.

Proposal 2 *– The Forum proposed 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.*

There was general agreement amongst those at the workshop that there should be more requests for Interim Hearings from both the applicant and respondent. The written responses supported this; JACS agreed that Interim Hearings are a good route in certain circumstances.

A number of reasons were proposed to explain why these hearings are perhaps not used as often as they could be, including; that the cost of legal representation for an Interim Hearing to determine a strike-out application might add to legal costs, so employers decide to take their chance at the main hearing; if the Tribunal does not strike out a claim early in the process, the employer offers a financial settlement rather than proceed to hearing; and that lawyers sometimes do not call for a claim to be struck out when it might be appropriate.

Workshop participants commented that it should be clearer in what circumstances the Tribunal might consider striking out a claim; the Tribunal should be managing the cases and suggesting alternatives to resolve claims more quickly. It was also suggested that directions or Interim hearings must occur earlier in the process, to avoid the issue of mounting legal costs.

This was supported in the written responses; a law firm commented *"The current Tribunal procedure for the submission and administration of claims is*

satisfactory. However, we consider that the system could be developed to ensure that the processes to be adopted by the Tribunal are full and clear, enabling parties to clearly determine the basis on which matters, such as the strike out of claims, would be dealt with by the Tribunal."

The Employment Lawyers Association commented similarly; *"The current process could be improved by reviewing and regulating Tribunal processes and policies, including in relation to matters such as interlocutory orders, the basis of strike out applications, documents and witnesses. Whilst the Tribunal currently exercises it's discretion to strike out applications which it considers have no reasonable prospect of success…it would greatly assist all parties if the process for the exercise of that discretion could be set out in detail."*

If a more thorough consideration of the Tribunals' procedures results from this recommendation, the Tribunal might wish to consider a suggestion from an anonymous respondent who said that the level of Tribunal administration should be increased. *"As with the UK if a Claim Form is incomplete, ambiguous or illegible it should be returned to the Claimant for proper completion before it is lodged with the Tribunal. This would mean a Claim Form is not accepted simply automatically and on face value; potentially incurring the Respondent unnecessary time and cost implications from the outset (by requesting better and further particulars for example) before a more formal Response can be submitted."*

The Forum notes that if a case has **no reasonable prospect of success**, a UK tribunal chairman can strike it out the following grounds –

- That all or part of it is scandalous, or vexatious or has no reasonable prospect of success
- That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent has been scandalous, unreasonable or vexatious
- That the claim has not been actively pursued
- That there has been non-compliance with an order or practice direction
- That the chairman considers that it is no longer possible to have a fair hearing in those proceedings.

Proposal 3 *- The Forum proposed that awareness should be increased of the option for either party to request an Interim hearing at an early stage in the process…as well as providing more detail in the Tribunal User's Guide to explain the purpose of such a hearing …and the potential outcomes.*

There was a strong response from both the written responses and at the public workshop that there is a lack of information about the grounds on which

an Interim Hearing may be requested, or what the purpose is. Many felt, including employers themselves, that employers may be suffering due to a lack of understanding of how to deal with claims.

A finance industry employer commented *"It appears that employers were not fully aware that they could always seek an Interim hearing if they thought a claim may be vexatious."*

At the workshop in particular, employers agreed that with better knowledge and more training, they might be better positioned to deal with claims, either without legal representation, or without simply offering a financial settlement to avoid a hearing.

JACS noted that their training sessions try to raise awareness of this and agreed that further information could be provided via their literature, commenting that *"More awareness for both parties is key to ensuring a fair process. If both parties are aware of the possibility for an interim hearing, not only can employers seek to have a vexatious claim struck out but an employee can request an interim hearing for elements such as disclosure of relevant information, documents or emails held by an employer – which may mean that the matter can be resolved sooner."*

Staff Side also agreed, commenting that *"There should be education to raise awareness about the use of these hearings (& about what constitutes a vexatious claim)."*

Noting some of the comments in relation to Proposal 2 and the need for further details of the precise process, the Forum feels that the grounds on which the Tribunal will determine matters such as whether an Interim hearing may be held and what other orders the Tribunal may make at an Interim hearing may need to be formalised.

Proposal 4 *- The Forum proposed 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.*

An early recommendation from the Employment Forum, which was approved by the former Employment and Social Security Committee in 2001, had 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.

There was general agreement at the workshop that the power to award legal costs does not fit with the principle that the Tribunal is intended to be non-legalistic, however it was noted that some parties feel that they require legal representation to deal with the Tribunal procedures.

In preparing the White Paper, the Forum felt strongly that the imbalance felt by employers appears, at least in part, to stem from the fact that employers are more often legally represented (and subject to costs) than employees.

JACS commented in support of the proposal that *"It is often the prospect of mounting legal costs that leads an employer to agree that a "commercial offer" should be made to a claimant rather than the employer defending at a Tribunal hearing what he believes to have been legitimate action against the employee. This can result in the "employee cash machine" feeling expressed in the White Paper."*

A law firm commented that ***"****Whilst we strongly support a Tribunal which does not require a party to engage legal representation, we do not consider that encouraging parties not to bring legal representatives (even in simple cases) is democratic or reasonable…Our present Tribunal system is based on the principle that a party to proceedings may choose to represent themselves or to seek representation from friends, colleagues, trade union representatives or legal representatives."*

The Employment Lawyers Association commented similarly; *"Parties should not be discouraged from seeking representation, legal or otherwise. The question of what constitutes a "simple case" is not necessarily a straightforward one."*

The Forum accepts that this Proposal was inappropriate in that it stated that parties **should be** encouraged **not to** bring legal representatives, when in fact the intention is that legal representatives **should not be** encouraged, but equally should not be discouraged.

Other proposals

The Forum's White paper was developed on the basis of information available to the Forum at that time. The Forum understood that the Tribunal and JACS deal with few genuinely vexatious tribunal claims and the Forum was opposed to introducing complex or legislative measures for what appeared to be a limited problem.
As is the purpose of consulting with stakeholders, wider issues and further information came to light during consultation, leading the Forum to reconsider

the other available options to discourage 'nuisance' claims, such as where the employee has no intention of pursuing the claim to full hearing, where the employee is seeking to damage the employers reputation, or where the employee is perceived to be trying their luck as they have nothing to lose financially. Three alternatives are discussed further below; they each bring advantages as well as disadvantages. The Forum wishes to improve the system without creating more difficulties.

Costs Award

The Forum recognised that, in order to address the wider concerns that were raised during consultation, any power of the Tribunal to award costs must include the power to award costs for legal representation. Giving the Tribunal the power to award other costs, such as travel expenses and expert witnesses' costs, as in Guernsey, is unlikely to change behaviours in that it would not address employers' concerns about the cost of defending a claim, nor would it deter vexatious claims from employees as there are less likely to be considerable (if any) travel or witness costs.

The Forum considers that 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.

A number of the responses received have however provided further information for the Forum to consider. This aspect of the consultation elicited the strongest views and, as anticipated, the comments were polarised, with employers associations and lawyers holding views contrary to those of trade unions and staff associations.

The Forum was mindful of a fundamental point noted by a number of the respondents, which can be summarised by reference to a comment from the Employment Lawyers Association; *"Any system which does not place participants at some risk in circumstances where they bring inappropriate claims (or where their conduct is inappropriate) is one which is open to abuse"*.

Prior to consultation, the Forum understood that there are few genuinely vexatious tribunal claims and was opposed to introducing complex measures for what appeared to be a limited problem. During consultation however, and particularly at the public workshop, a number of respondents explained that in fact there may be 'hidden' vexatious claims as employers will often offer a financial settlement, even when they believe that a claim is vexatious, to avoid the time, expense and potential reputation damage of a full public hearing.

The Chamber of Commerce commented that, *"not all vexatious claims and claims without reasonable prospect of success reach the final stage of tribunal proceedings. They may be conciliated at an earlier stage if the respondent feels it is more economical to settle than face their own costs associated with protracted litigation"*.

This concern about 'hidden' vexatious claims was also raised at the workshop; employers often being encouraged by insurance companies and representatives to settle cases rather than pursue them. A commercial approach is usually taken by the employer as they are often litigating for small sums. There was a concern that this further encourages vexatious claims when other employees see the "pay offs" made to former colleagues.

The workshop showed that there is some appreciation of the potential for costs awards to disenfranchise the lower paid, however some respondents continue to feel that there should be an option for the Tribunal to award a limited amount of costs in cases of truly vexatious claims.

A law firm commented that *"it is absolutely appropriate for the Tribunal to have discretion (to be used on a limited basis) to award costs…Providing the Tribunal with the power to award costs ensures that the Tribunal system is not abused and is able to protect an innocent party….We strongly contest any assertions that providing the Tribunal with the power to award costs will encourage lawyers to act any differently and we do not consider that it would result in an increase in the number of legally represented parties, especially if the amount that the Tribunal can award is at a relatively low level."*

The Forum recognises that lawyers and other representatives who belong to professional bodies will be restricted in their behaviour by established rules of professional conduct.

An anonymous respondent said that the power to make costs orders *"would also alleviate the financial burden involved with Tribunal proceedings. Even unrepresented parties will spend time and money on lodging or defending a claim and it is important that these are not dismissed as nominal or consequential."*

The Employment Lawyers Association commented that, *"A limited costs jurisdiction would enable the tribunal to deal with genuinely vexatious claims in a fair and equitable manner…We would respectfully disagree with the Forum's assertion that an appropriate system to deal with vexatious claims is already in place. It is clear that there is a perception amongst some employers that the Tribunal has insufficient power to address such issues."*

The written responses from trade unions and others were clearly opposed to the suggestion; Sam Le Breton believes that *"we should go back to the reasons for the setting up the Employment Tribunal that everyone should have access without fear of bureaucracy or financial penalty."*

Staff Side is *"not persuaded this is a major problem and therefore oppose introducing fees for taking a claim to the tribunal or awarding costs in the event of a claims being deemed vexatious."*

"Unite urges the Employment Forum not to be swayed by unsubstantiated claims that have been made by employer associations such as the Jersey Hospitality Association." Unite believes that *"If unwarranted power to award costs to employers was given Unite believes that the introduction of such costs would disproportionately affect access to justice for unrepresented and lower paid workers."*

The Royal College of Nursing noted that *"the threat of costs by employers' lawyers intimidates claimants, and interferes in the 'due process of a case'. In summary, the Royal College of Nursing support the Forums view that there is already a reasonable system in Jersey to dispose of vexatious claims."*

The Channel Islands Co-operative Society and Unite both proposed the introduction of a 'wasted costs' order. *"In the UK these are used when there has been unreasonable conduct by a representative (only where the rep acts in pursuit of profit). The order is not made against the applicant so should not be a deterrent to bringing a claim."* (Channel Islands Co-operative Society)

"*The ability to make a "wasted costs order" would deter paid representatives from prosecuting cases with little chance of success. It is likely to ensure that any potential applicant receives accurate and realistic advice." (Unite)*

The Forum considers that it might be appropriate to introduce the concept of wasted costs, but only as part of a wider package of costs awarding powers.

It was also noted at the workshop that the Tribunal does not have the power to enforce awards if parties refuse to pay (as is the case with tribunals in other jurisdictions). Costs could therefore only be enforced by the courts, e.g. petty debts. This brings further bureaucracy.

The Forum recognises that the power to award costs may be the only practical solution available to recompense an employer where an employee makes a claim maliciously, with the intention of damaging the employer. There was some support amongst the Forum members for the development of a limited costs regime, to include limited costs for legal representation. The Forum noted that none of the respondents had stated that they would expect

a costs order to reimburse their full legal costs, but rather as a means of demonstrating that the vexatious nature of the claim had been recognised by the Tribunal.

If the Forum were to recommend the power to award costs, it would wish to consult on the details of the regime, including the maximum sum available, what types of costs could be claimed, and on what grounds; such as, against all losing parties, or in more limited circumstances, such as where there has been abuse of process, or failure to attend, for example.

The Forum considers that there would be little benefit in further consultation at this time as responses are likely to remain polarised.

There is concern that if the maximum costs award would be limited to £500 as it was initially in the UK (until July 2001) and is currently in the Isle of Man, this brings no further incentive for employers and their representatives to pursue a case to a full hearing, rather than settle such claims to save costs.

The power does not appear to be successfully reducing 'grudge' claims in the UK to the extent that might be expected. A November 2010 news item stated that *"HR chiefs are angry that far too many spurious claims from former disgruntled employees who hold a grudge against their employer "clog up" the courts and waste taxpayers' money."*

Despite the power to award costs up to £10,000 being available to UK employment tribunals, there have been calls *"for drastic measures to overhaul the "flawed" employment tribunal system in the UK and reduce the number of cases in the system."*[2]

The Forum considered two other potential solutions as alternatives to costs awards; a lodging fee and a deposit to pursue a claim. These options bring their own advantages and disadvantages, as discussed below.

Lodging Fee

Prior to public consultation, the Minister's had received a suggestion that there could be a small fee to lodge a claim of around £50-100 which would be repaid to the applicant if their claim is successful. If the applicant does not win their case, the fee would be given to the other party as a contribution towards their costs. In genuine cases of hardship, the Tribunal Secretary would have the power to waive the fee if she was satisfied that there was a genuine case to answer.

[2] The Telegraph, 8 November 2010. www.telegraph.co.uk/finance/jobs/8117031/Workers-should-pay-up-to-250-to-sue-their-employer-HR-chiefs-say.html

Having discussed this option with JACS and the Employment Tribunal, the Forum was concerned that even a small lodging fee could be prohibitive; it potentially denies people their rights and might discourage genuine claims.

This view is supported by one law firm, who said that, *"many genuine claimants may not have the cash readily available to pay such a fee (even if it is to be returned at a later date) and payment and re-payment of sums could create an administrative burden for the Tribunals."*

The Royal College of Nursing commented that *"a lodging fee would be unlikely to be a significant deterrent to the 'truly vexatious claimant."*

The Jersey Motor Trades Federation did not support the concept of a nominal lodging fee. Unite considered the concept of a lodging fee to be inequitable; *"There must not be any unnecessary barriers to justice within the employment tribunal system, which could potentially prevent workers from pursuing an employment tribunal. A worker should always have the right to log a claim with an employment tribunal free of charge."*

Some of the stakeholders who attended the public workshop felt that the Employment Tribunal should be no different from other courts, where you have to pay a fee to take your claim (e.g. the Petty Debts Court). In their written response, the Employment Lawyers Association commented that *"The Tribunal is a public resource which must be paid for one way or another. Issuing legal proceedings against another party is a serious step which should be recognised as such."*

The Jersey Chamber of Commerce commented similarly that *"The fee would demonstrate the claimant's commitment to tribunal proceedings and the understanding that instigating such proceedings is a serious matter with serious implications. The fee would go to the Tribunal (to assist with their costs) or be offset against a compensation/costs award made by the Tribunal."*

Similar issues are currently being considered in the UK; a small fee to register a claim that should be affordable whilst being sufficient to make people think about the merit of their claim, with suggestions ranging between £5 and £250. The Forum has however found it an impossible task, to agree a figure that serves both purposes, without introducing some test of affordability.

The Employment Lawyers Association noted that *"A key issue in this regard would be to weigh up the administrative cost of gathering in such a fee, including in terms of considering any hardship application for waiver of the*

fee. If the likelihood is a net loss then it would probably not be a practical measure."

Whilst the respondents were generally opposed to a blanket lodging fee on the basis of the administrative burden and deterrent to genuine claims, the Forum considered that if the number of claimants required to pay a lodging fee could be limited to those who are deemed to be pursuing vexatious or 'grudge' claims, this would create less of an administrative burden. The Forum recognises however that this is difficult because it would require an early assessment of the claim by the Tribunal.

Deposit to pursue claim

As part of the Forum's research into what other options might be available to the Tribunal, the Forum noted that when a UK tribunal decides at an Interim Hearing that a case has **little** reasonable prospect of success (as opposed to **no** reasonable prospect of success which leads to a claim being struck out); it can order the payment of a deposit of up to £500 as a condition of being permitted to proceed with the claim. This option was not considered during the consultation.

A deposit order is a less severe alternative where a claim is perceived to be weak, but which would not necessarily be described as having **no** reasonable prospect of success. The question as to whether a deposit order can be made can only be dealt with at an Interim Hearing and all parties are entitled to submit representations and appear to present oral argument. A copy of any deposit order is sent to the parties with an explanation of why the chairman considers the case to have little reasonable prospect of success and explaining that if the party persists with proceedings, then costs may be awarded against him or her resulting in the loss of the deposit.

Whilst recognising that UK Tribunals may also ultimately order costs, the Forum considers that making provision for deposit orders in such circumstances might provide an early deterrent to applicants who are 'trying their luck'.

Before making a deposit order, a UK tribunal chairman must first take reasonable steps to ascertain the ability of the party to comply, and in determining the size of the deposit, the chairman is obliged to take into account any information ascertained about the party's ability to pay. The party then has 21 days, plus a discretionary further 14 days, to pay the deposit. If the party fails to meet this timescale, the chairman must strike out the claim (or the particular part of the claim).

The Forum considered that, to avoid introducing further administration including consideration of an appropriate level of deposit, or whether the party can pay, a fixed deposit of £50 could be required in these sorts of circumstances, with no discretion for the Tribunal to order a higher or lower deposit. The figure could be set by Ministerial Order so that it may be increased or decreased if appropriate in the future.

As in the UK, the deposit could be refundable to the party at the end of the full hearing if they go on to win their case. If the Tribunal finds against the party, the sum could be awarded to the other party, as a token amount towards their costs. The Forum notes however that the Tribunal would have to assess whether the other party has any costs, and if they have not, whether the Tribunal would retain the deposit.

A Tribunal decision as to whether a deposit is required could be provided early in the process so that both applicant and respondent are aware of whether the claim has any reasonable prospect of success. Fewer employers might agree to settle misguided or vexatious claims at an early stage if this deterrent was available.

This approach appears to meet the demand for a demonstration of an applicant's commitment to proceedings and greater credibility for the process, whilst avoiding some of the disadvantages of other options.

However, only the Tribunal can decide on the merits of a claim by looking at the full details of the case. This option would bring the potential cost of an additional Tribunal hearing. As noted earlier (page 8), employers will often take their chance at the main hearing to avoid the additional cost of legal representation at an Interim hearing.

SECTION 4 – Recommendation

Proposal 1 - The Forum recommends that whilst employees and employers must continue to be encouraged to use the free and impartial services of JACS, an employee should not be required to confirm that they have taken professional advice (from JACS or any other adviser) when submitting an application to the Tribunal.

Proposal 2 – The Forum recommends that the Tribunal should continue to manage cases via Interim Hearings (where appropriate) as early as possible in the process to avoid the issue of mounting legal costs, and that the grounds on which the Tribunal will consider striking out a claim must be clarified.

Proposal 3 – The Forum recommends that in addition to publicising information about the option to request an Interim Hearing and the purpose of such a hearing, the rules and procedures that the Tribunal already operates under should be formalised, as well as setting out the grounds on which such a hearing may be requested, the matters that can be dealt with at the hearing, and other orders that the Tribunal may make at the hearing.

Proposal 4 – The Forum recommends that the Tribunal should clarify the support that it may provide to either party, but accepts that legal representation, whilst not encouraged, should not be discouraged; a party has the right to choose a representative.

Costs award – The Forum is of the view that giving the Tribunal the ability to award costs would not necessarily reduce the number of vexatious Tribunal claims. The Forum has concluded that this is a much wider issue than just vexatious claims. The Forum appreciates that there may be a need to introduce a limited element of 'risk' to a vexatious claimant, or in other circumstances, and accepts that, subject to a wider review of Employment Tribunal procedures, the Minister might conclude that it is necessary to introduce a limited power to award costs in the future.

Lodging fee – The Forum considered that the requirement to pay a small fee on lodging a claim could introduce the required financial stake. However the Forum considers that a truly vexatious claimant is unlikely to be deterred by a small fee, whilst the risk of deterring genuine claimants who cannot afford the fee would only be addressed by introducing an administratively burdensome test of affordability.

Deposit to pursue claim - The Forum considered the requirement for an employee to pay a deposit to pursue their claim to full hearing where the Tribunal has decided at an Interim Hearing that the claim has little reasonable prospect of success. This option would reduce the administration of fees and limit the deterrent factor to employees, however brings potentially the additional cost of legal representation at an Interim Hearing.

Conclusion

The Forum intended to provide a balance between introducing complex new procedure or legislation, whilst providing an adequate deterrent to claimants (mainly employees) who are taking a claim vexatiously or maliciously, or are 'trying their luck' with nothing to lose.
The Forum believes that the recommendations, as proposed, would assist in reducing vexatious or nuisance claims. The Forum expects that the value of these changes may be assessed in terms of user awareness of processes, as

well as increased and appropriate use of Interim Hearings. The other potential solutions that have been considered would require legislative measures, potentially bringing a greater requirement for legal representation.

The Forum is also aware that the power to reduce an unfair dismissal award where an employee has contributed to their dismissal is relatively new to the Employment Tribunal and a review will determine whether this has had an impact on claims. User awareness of this power may serve to deter employees from taking "nothing to lose" unfair dismissal claims given that the award may be reduced to zero.

The Employment Lawyers Association suggested that *"This is an appropriate time to consider an independent review of the administration of our employment law system, including the workings of the Tribunal and appeals from decisions of the Tribunal."*

Whilst it is not for the Forum to recommend that the Minister reviews a judicial body, the Forum considers that these issues would most appropriately be considered as part of a wider independent review of the Employment Tribunal.

SECTION 5 – Other comments

The following suggestion is noted for information; it is outside of the remit of this consultation.

Unite referred the Forum to "*the recent regulation tightening by the former UK Labour Government of 'no-win, no fee' solicitors behaviour.*[3] *For too long many workers who have taken cases to employment tribunal with 'no-win, no-fee' solicitors wrongly assume they are getting legal advice and representation for free, which was not the case. A lack of regulation meant that workers often signed up to agreements with solicitors; without being given clear information as to the nature of any extra charges that might be incurred, regardless of whether the case was won or lost and exactly how much would be deducted if there was a final award. Nor were they alerting individuals to the existence of alternative sources of legal advice such as trade union legal departments. Therefore Unite would like the Employment Forum to consider whether this is an issue for Jersey.*

APPENDIX - RESPONDENTS

[3] http://yourdemocracy.newstatesman.com/parliament/damages-based-agreements-regulations-2010/HAN150032279

SUMMARY OF RESPONSES AND RECOMMENDATION **Jersey Employment Tribunal; Costs and Vexatious Claims**	

1. Jersey Advisory and Conciliation Service
2. Royal College of Nursing
3. Channel Islands Co-operative Society
4. Jersey Motor Trades Federation
5. Finance industry employer
6. Staff Side
7. Seymour Hotels
8. Unite
9. Jon Scott
10. Sam Le Breton
11. Jersey Chamber of Commerce
12. Anonymous
13. Employment Lawyers Association (Jersey Branch)