

CONSULTATION PAPER

Compensation awards in respect of written terms of employment, pay slips and rest days



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SECTION 1 - PURPOSE OF CONSULTATION

The Minister for Social Security (the 'Minister') has directed the Employment Forum (the 'Forum') to consult on two distinct areas of the Employment (Jersey) Law 2003 (the 'Employment Law') by the end of 2015. This consultation relates to one of those areas¹; compensation awards in respect of written terms of employment, pay slips and rest days.

Where an employer does not meet certain of its obligations under the Employment Law, there is currently a mechanism to impose a criminal penalty (including a fine) in each case. This is considered unwieldy and so the Forum has been asked to consult on whether the Employment and Discrimination Tribunal (the 'Tribunal') should instead have the power to award compensation to an affected employee for failures relating to written terms of employment and payment of wages. The Forum has also been asked to consult on introducing a power to award compensation to an affected employee for failures relating to statutory rest day entitlement.

The Forum is seeking the views of stakeholders and will consider any comments received before making a recommendation to the Minister. This paper sets out the background and the position in the UK, Guernsey and the Isle of Man.

¹ The other area of consultation relates to the unfair dismissal qualifying period for employees working under short, fixed-term contracts. That consultation can be found on the website www.gov.je/consult

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SECTION 2 - BACKGROUND

Power to fine

Where an employer does not meet certain obligations under the Employment Law, there is currently a mechanism to impose a criminal penalty (including a fine) in each case. These include where the employer has failed to provide written terms of employment or has failed to provide an itemised pay statement.

The Tribunal has no power under the Employment Law to impose a criminal penalty in respect of matters described in the Law as offences. These are matters for the criminal law and must be heard before the Magistrate's Court or Royal Court.² The Attorney General has exclusive jurisdiction over the prosecution of offences in Jersey and the offences created under the Employment Law would be dealt with before the criminal courts of the Island.

Criminal proceedings are considered to be a cumbersome and expensive way to deal with matters such as this. The Attorney General would make a decision as to whether a criminal prosecution is in the public interest and may decide that to prosecute an employer for failing to provide written terms of employment or pay slips to one or two employees is not in the public interest.

Detriment and dismissal

Article 31 of the Employment Law gives employees the right not to suffer a detriment by any act, or deliberate failure to act, by an employer, which was done on the ground that any action was taken by the employee (or proposed to be taken) with a view to enforcing a right under the Employment Law. Where a Tribunal finds a complaint well founded, it can make a declaration to that effect and it can award compensation to the employee. In determining compensation, the Tribunal will consider what amount is just and equitable in all the circumstances, having regard to the employer's default and any losses sustained by the employee as a result of the act or failure to act³.

² See Royal Court appeal, case number 2008/82
[www.jerseylaw.je/judgments/unreported/Pages/\[2008\]JRC163.aspx](http://www.jerseylaw.je/judgments/unreported/Pages/[2008]JRC163.aspx)

³ The award of compensation for detriment will be limited to a maximum of 4 weeks' pay from 1 September 2015.

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In addition, Article 68 of the Employment Law provides that, where an employee is dismissed because they have brought proceedings against the employer to assert a statutory right or have alleged that the employer has infringed a statutory right, the employee is regarded as having been automatically unfairly dismissed. This means that there is no requirement for the Tribunal to determine whether the dismissal is fair or unfair having regard to the circumstances of the case. In addition, the qualifying period does not apply which means that the employee may claim unfair dismissal from day one of employment. Compensation for unfair dismissal can be up to 26 weeks' pay where an employee has more than 5 years' continuous service.⁴

Minister's request to consult

Employers have been required, by law, to provide pay slips since 1962 and to provide written terms of employment since 1992. In addition, the Employment Law has been in force for almost ten years. Despite this, some employers are persistently failing to meet their basic obligations. This may be because offences have not, to date, been prosecuted.

The Minister has emphasized to the Forum the importance of enabling employees to enforce these rights via the Tribunal in order to demonstrate fairness to the majority of employers who are complying with these important and basic rights for employees.

The Forum has been asked to consult on the Minister's proposal to replace two of the criminal offences. Instead of a power for the criminal courts to fine an employer who has breached certain parts of the Employment Law, the Tribunal would instead have the power to award compensation which would be paid to the employee.

Points (i) to (iii) below set out the three specific areas that the Forum has been asked to consult upon and the Minister's proposal to amend the Employment Law is outlined in each case.

⁴ The statutory rights to which Articles 31 and 68 apply are those for which the remedy is by way of a complaint to the Tribunal.

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i. Written terms of employment (Part 2 of the Employment Law)

Articles 7 and 8 of the Employment Law enable an employee to complain to the Tribunal if written terms of employment have not been provided, or where there is a question as to what the terms of employment should contain. The Tribunal may determine what particulars should have been included in the terms of employment and as a remedy, may deem that the employer has given the employee such a statement. This may be perceived as an inadequate remedy where the complainant's employment has already ended. Complaints to the Tribunal about failures relating to terms of employment often accompany other complaints, such as unfair dismissal, payment of wages and holiday pay claims.

Article 9 of the Employment Law provides that, where an employer fails to provide written terms of employment in accordance with the Law, or fails to notify an employee of changes to written terms, this is a criminal offence liable to a fine of level 4 (£5,000) on the standard scale. The Employment Law specifies that, on the issue of a summons, or on the arrest and charge of a person, in respect of such an offence, the Centenier responsible must notify the Tribunal. The Tribunal must then stay any proceedings that have been (or may be) started by the employee in respect of their written statement of employment particulars until the criminal proceedings have been concluded and the time available for an appeal has expired.

The Minister has proposed that the offence liable to a fine could be removed from the Employment Law and that an additional remedy should be available to the Tribunal; a power to award the employee fixed compensation of 2 weeks' pay (uncapped) where the employer has failed to provide written terms of employment in accordance with the Employment Law.

ii. Payment of wages (Part 5 of the Employment Law)

Article 53 of the Employment Law enables an employee to complain to the Tribunal if their employer has not provided them with an itemised pay statement, or where the pay statement does not comply with what is required by Article 51 of the Employment Law (for example, showing both gross and net pay). The remedies (Article 54) provide that the Tribunal may;

- a. Make a declaration that the employer has failed to give a pay statement, or the pay statement does not comply with the Law

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- b. Order that a pay statement be issued in a particular form and the particulars that must be contained within it
- c. Order the employer to repay to the employee any deduction from pay that was not detailed in the itemised pay statement.

In addition, Article 55 of the Employment Law provides that an employer who contravenes **any** of the provisions of Part 5 incurs a criminal penalty of a fine of up to £5,000 in respect of each offence. In addition to the offences that this creates relating to the requirement to provide a written, itemised payslip, offences are also created in relation to;

- Wages not paid in legal tender
- Partial payment of wages in inappropriate/ unreasonable allowances
- Wages not paid directly to the employee
- Limiting the freedom of an employee to dispose of wages
- Unlawful deductions from wages
- Wages not paid at regular intervals

The Minister has proposed that the offence for failure to provide a written, itemised payslip should be removed and that the Tribunal should have the power to award the employee fixed compensation of 2 weeks' pay (uncapped) where an employer has failed to give a pay statement in accordance with the Employment Law. It is assumed that the intention would be to retain the offences for the contravention of any of the other rights provided in Part 5.

iii. Minimum rest periods (Part 3 of the Employment Law)

Article 10 of the Employment Law provides that an employee is entitled to an unpaid rest period equivalent to 24 hours in each 7 day period, or 48 hours in a 14 day period. No criminal offence or powers to award compensation are provided in relation to this entitlement. A Tribunal declaration that an employee must be afforded the opportunity to take a certain number of unpaid rest days is unlikely to be a deterrent or penalty for the employer. It is also unlikely to be of benefit to the employee if they are 'awarded' a number of unpaid rest days some months after the period in which the rest was due, or after employment has ended.

Where an employer has refused to permit, or prevents, an employee from exercising the right to take a weekly rest day, the Minister has proposed that the Tribunal should have the power to award fixed compensation of 2 weeks' pay,

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uncapped. The employee would be required to submit the claim within 13 weeks of the time the rest should have been allowed, or any longer period if the complaint is submitted with another Tribunal complaint after employment has ended.

SECTION 3 – OTHER JURISDICTIONS

i. Written terms of employment

UK

In the UK, most employees are entitled to receive - within 2 months of starting employment - a written statement of employment particulars setting out their main terms and conditions of employment. Any subsequent change to those terms and conditions must also be confirmed in writing. An employee can bring a claim to an employment tribunal if the employer has failed to issue a statement, or if the terms set out in the statement are inaccurate. If the claim is upheld, the employment tribunal can make a declaration specifying the correct terms.

There is no free-standing right to compensation for a failure to give an accurate statement or for failing to notify an employee of any changes. However, if an employee succeeds in another employment tribunal complaint, e.g. unfair dismissal or an unlawful deduction from wages, and at the time the claim was brought the employer was in breach of its duty to provide a written statement of employment particulars or written notification of any change, the tribunal **must** make an award equivalent to two weeks' pay and **may**, if it is just and equitable to do so, make an award of four weeks' pay. The value of a week's pay for these purposes is subject to the statutory limit (£475 from 6 April 2015). Where there are exceptional circumstances that would make an award unjust or inequitable the Tribunal is not obliged to make any financial award.

Isle of Man

In the Isle of Man, most employees are entitled to receive - within 4 weeks of starting employment - a written statement of employment particulars which must contain certain specified terms and conditions of employment. An employee who is not given a written statement of employment particulars, who is not notified of a change in those particulars, or who contests the accuracy of the statement, may refer the matter to an employment tribunal. Where employment has ended, the reference to the employment tribunal must be made within 3 months of the end of

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the employment. The employment tribunal will decide what particulars the employee should have been given. Where the employee has made a written request to the employer and the employer has not provided particulars to the employee within 14 days of receiving the request, the employment tribunal must make an award of 2 to 4 weeks' pay as compensation (capped at £480 per week).

If an employee succeeds in another employment complaint, e.g. unfair dismissal, and at the time the claim was brought the employer was in breach of their duties to provide a written statement of employment particulars, or to notify the employee of changes to that statement, the employment tribunal **must** make an award of two to four weeks' pay, irrespective of whether the employee has made a written request to the employer. In addition, failure to give a written statement is an offence in the Isle of Man, punishable by a fine of up to £1,000, and a further fine of £50 a day for continued non-compliance; giving a false statement is an offence, punishable by a fine of up to £2,500. The employer may face prosecution by the Department of Economic Development.

Guernsey

In Guernsey, most employees are entitled to receive - within 4 weeks of starting employment - a written statement of employment particulars which must contain certain specified terms and conditions of employment. A failure to give a written statement of employment particulars does not in itself give rise to any right to compensation for the employee.

There is a maximum penalty equal to Level 4 on the Uniform Scale of Fines where an employer fails to issue written statements or keep them up-to-date in accordance with the provisions of the Law. If, during any investigation, a person fails to produce any required information or documentation, obstructs any investigation, tampers with any of the evidence, makes a false, deceptive or misleading statement, or allows false, misleading or deceptive information or documents to be produced, there is a maximum penalty equal to Level 5 on the Uniform Scale of Fines or imprisonment for a term not exceeding three months, or both.

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ii. Payment of wages

UK

Employers in the UK must provide every employee with an itemised pay statement showing the gross amount payable, detailing any deductions made and the net amount actually paid. A failure to give an itemised pay statement does not in itself give rise to any right to compensation, but where an employer has made un-notified deductions from an employee's pay in the 13 weeks prior to an employment tribunal complaint being lodged, then the tribunal may order the employee to be reimbursed either fully or in part.

Isle of Man

Employers in the Isle of Man must provide every employee with an itemised statement of pay (pay slip) which must contain certain details. The right to a pay slip may be enforced by a complaint to an employment tribunal, which may determine the information which should have been included in the statement. As in the UK, an employee has no right to compensation for these failures. An employment tribunal may award compensation in respect of un-notified deductions of pay during the previous 13 weeks. If employment has ended, the reference to the employment tribunal must be made within 3 months of the end of the employment. Failure to give an itemised pay slip is also an offence, punishable by a fine of up to £1,000, and a further fine of £50 a day for continued non-compliance; giving a false statement is an offence, punishable by a fine of up to £2,500. The employer may face prosecution by the Department of Economic Development.

Guernsey

Employers in Guernsey must provide every employee with an itemised statement of pay (pay slip) which must contain certain details. As in the UK and the Isle of Man, an employee has no right to compensation for these failures. There is a maximum penalty equal to Level 4 on the Uniform Scale of Fines where an employer does not issue all employees with pay slips detailing all earnings and deductions. If, during any investigation, a person fails to produce any required information or documentation, obstructs any investigation, tampers with any of the evidence, makes a false, deceptive or misleading statement, or allows false, misleading or deceptive information or documents to be produced, there is a maximum penalty equal to Level 5 on the Uniform Scale of Fines or imprisonment for a term not exceeding three months, or both.

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iii. Minimum rest periods

UK

As part of the 1998 Working Time Regulations, workers and employees are entitled, in general, to an uninterrupted weekly rest period of 24 hours in each seven day period. This can, if the employer chooses, be averaged out over 2 weeks and an employer can either provide two rest periods of 24 hours each or one rest period of 48 hours. There are a wide range of exceptions to this right covering situations such as foreseeable surges in activity, working away from home, and work involving the need for continuity of service or production. There is also an exception for shift workers changing shifts or workers, such as cleaners, whose work may be split up over the course of a day. Collective or workforce agreements may also modify or exclude the right to a weekly rest period. Where one of these exceptions applies, the worker is entitled 'wherever possible' to be given an equivalent period of compensatory rest.

A complaint may be presented to an employment tribunal if an employer refuses to allow the taking of a rest period or fails to provide a period of compensatory rest. If the complaint is upheld, the tribunal can make a declaration to that effect and award compensation based on what is "just and equitable in all the circumstances" having regard to the employer's default and any losses sustained by the employee.

Isle of Man

There is no statutory entitlement to rest days in the Isle of Man, other than for shop workers, and so any rest day entitlement for most workers depends on their terms of employment. For shop workers, however, the terms of employment must not oblige the person to work for more than 10 hours in any 24 hours, or for more than 44 hours in any week. If the worker's terms of employment include an obligation contravening this requirement, the employer commits an offence punishable by a fine of up to £2,500.

Guernsey

There is no statutory entitlement to rest days in Guernsey. Any entitlement depends on the terms of employment.

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SECTION 4 - RESPONDING TO THE CONSULTATION

The Forum would be grateful to receive your comments on the issues highlighted in this consultation paper. You can respond in the following ways:

- complete the online survey www.gov.je/consult
- email or post your comments to -

Kate Morel
Forum Secretary
P.O. Box 55
La Motte Street
St Helier
JE4 8PE

Email E.Forum@gov.je
Telephone 01534 447203

If you require a paper copy of the survey, please contact the Forum Secretary.

Please submit your comments by 17 June 2015.
