CONSULTATION EXERCISE ON THE LEVELS OF COMPENSATION AWARDS FOR BREACHES OF THE EMPLOYMENT AND DISCRIMINATION LAWS

REPORT AND RECOMMENDATIONS OF THE JERSEY EMPLOYMENT FORUM

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June 2024

Executive summary of the conclusions and recommendations of the Employment Forum

As a result of the Employment Forum's deliberations on the issue of the appropriate level and structure of compensation awards in Jersey, it makes the following recommendations:

- The maximum number of weeks' pay that may be awarded for breaches of an employee's statutory rights, pursuant to the Employment (Jersey) Law 2003 (the Employment Law) should be increased from 4 to 8 weeks, resulting in a range of zero (0) to eight (8) weeks' pay

- The existing structure relating to compensation for unfair dismissal (which involves a calculation relating to the number of weeks' pay depending upon length of service) should be retained. However, the scale of compensation set out in the Employment (Awards) (Jersey) Order 2009 (the Awards Order) should be extended beyond the current 5-year maximum period of employment to provide for a more gradual tapering than exists currently (the recommended new bands are set out below). Furthermore, the Employment and Discrimination Tribunal (the Tribunal) should be granted the discretion to apply an uplift of up to 25% of the relevant statutory compensation limit in circumstances where an employer's conduct has been particularly egregious. The Tribunal already has a discretion to apply a reduction to an employee's award - in a limited number of circumstances – where the Tribunal finds that an employee's conduct has contributed to their dismissal

- The current mechanism of having two distinct compensatory elements to an award under the Discrimination (Jersey) Law 2013 (the Discrimination Law) - one for hurt and distress and a second for financial loss - should be maintained. However, the maximum award in employment-related discrimination cases (currently a cap of £10,000 for financial loss of which a maximum of £5,000 may be awarded for hurt and distress) should be replaced with a cap either of £50,000, or 52 weeks' pay, whichever is the greater, of which up to £30,000 may be awarded for hurt and distress

- The current jurisdictional limit under Article 4(1)(a) of the Awards Order in respect of claims in the Tribunal for contractual breaches of an employee's rights should be increased from £10,000 to £30,000, in line with the Petty Debts Court's jurisdiction. That limit should be increased whenever the Petty Debts Court's jurisdiction is increased

Recommendations for associated issues

- In appropriate cases, at its discretion, the Tribunal should have the power to anonymise its judgments

- A strictly limited costs regime should be introduced in the Tribunal to sanction or deter vexatious claims and conduct on the part of both employee and employer

- Fees to lodge claims with the Tribunal should not be introduced or contemplated

- The time limit for lodging claims with the Tribunal should remain at 56 days, but the time limit for filing a response should be increased from 21 days to 28 days

General Introduction

This report and its conclusions and recommendations have been prepared by the following members of the Jersey Employment Forum:

Carla Benest (Chair)	Marianne Russell
Hilary Griffin	Dougie Gray
Donna Abel	Graeme Stokes
Claire Kingham	Mark Richardson

The report represents the unanimous view of the Forum, following prolonged consideration and discussion.

As part of its consultation on, and review of, the operation and regulation of zero hour contracts and employment protections more widely in Jersey[1], the Forum considered the level of compensation awards available for breaches of employment and discrimination legislation.

The Forum recommended to the then Minister for Social Security that a separate consultation exercise be held on these specific areas of employment and discrimination rights. The Minister agreed with the Forum's recommendation.

The consultation exercise concluded on 31 January 2024 (though the Forum accepted a small number of responses sent after that date). 15 responses were received from individuals and organisations. Not all respondents covered each of the criteria identified below. The Forum is grateful for the input of these respondents.

Background

The Minister's direction to the Forum included a request that the Forum consider whether the current levels of award are fit for purpose and, if not, what level and type of sanction should be available to the Tribunal. The consultation exercise included a comparison of the position in other jurisdictions, including Guernsey, the Isle of Man, Ireland and the United Kingdom.

In the consultation arising out of its April 2023 report and recommendations, the Forum focused on four areas for consideration by respondents:

- **Compensation for breaches of most statutory employment rights;**
- **Compensation for findings of unfair dismissal;**
- **Compensation for financial loss and for hurt and distress in employment-related discrimination cases; and**
- **The £10,000 limit on the Tribunal's jurisdiction to hear claims for contractual breaches of an employee's rights.**

[1] Employment Forum's recommendations on the operation and regulation of zero hour contracts in Jersey.pdf (gov.je) – published April 2023.

SUMMARY OF THE INDIVIDUAL ELEMENTS OF THE CONSULTATION EXERCISE AND THE VIEWS OF RESPONDENTS

a) Compensation for breaches of most statutory employment rights

The Forum took the view that consideration should be given to updating the current criteria relating to the Tribunal's ability to award compensation to an employee for a breach of their statutory rights under the Employment Law. These include:

- the non-provision of payslips
- the non-provision of written terms and conditions of employment
- the right not to suffer any detriment
- the right to request flexible working
- the right to request a contract which reflects the reality of the employee's working pattern
- the right to a daily and weekly rest period
- the right to parental and adoption leave

The current maximum award for such breaches is four weeks' pay.

Generally, respondents to the consultation agreed that the current provisions for compensation should be updated. They considered that the current limit of four weeks' pay is insufficient to focus employers' minds on this important issue and encourage employers to comply with the law relating to employees' statutory rights.

The Forum noted that a week's pay is personal to each employee. Therefore, an award of one week's pay, for example, will vary in each case. The Employment Law provides for the calculation of a week's pay. The Forum also noted the continuing number of cases in the Tribunal which involved low earners who had had their statutory rights breached by their employer.

The Forum also noted that the Employment Law contains a criminal sanction for both:

- failing to provide a written statement of terms and conditions of employment (Article 9 of the Employment Law); and

- failing to provide a statement of wages (Article 55 of the Employment Law).

The Employment Law contains provisions for the enforcement of a requirement for the employer to produce and allow access to any records required to be kept under the various provisions of the Employment Law. A view was expressed that consideration should also be given as to whether there is a problem with either enforcement or the scope of criminal sanctions.

In the consultation, a view was also expressed by respondents that, while there might be a level of non-compliance by employers, an increase in the level of compensation is unlikely to address levels of non-compliance generally, and that most non-compliance would appear to arise from a lack of awareness and understanding of the Employment Law. In addition, there is an argument for enabling enforcement officers to be given the power to initiate proceedings against an employer before the Tribunal, which might result in administrative orders and penalties. This could, the argument goes, help to resolve an issue where an individual employee is reluctant to make a claim against an employer for whom they continue to work.

Another respondent expressed the view that an award based on weekly pay remains the most appropriate basis for compensation, being proportionate to the actual rate of pay, as opposed to a standalone penalty, which would penalise employers differently according to their size and resources. Two respondents supported an increase in the maximum award to eight weeks' pay, with a "floor" at four weeks' pay, on the basis that increased awards would give the Tribunal a better and more proportionate ability to make a more appropriate level of award.

One respondent suggested linking the level of compensation for breach to the turnover of the business, its profits or number of employees, arguing that for large employers any change in the level of compensation would be likely to have a minimal effect on financial performance and by extension their corporate behaviour in matters relating to employees' statutory rights.

Any impact of increasing levels of compensation would, by contrast, be felt more acutely by small and medium-sized businesses and therefore the emphasis should be on education and awareness-raising.

One respondent said that breaches of statutory employment rights were more likely to be found in less secure and lower-paid roles. This respondent also echoed the point that reluctance on the part of an employee in a precarious employment role to make a claim against their employer could be mitigated to an extent by effective enforcement action taken by a government entity to the Tribunal. In such circumstances compensation levels should be much higher, both to act as a deterrent and to encourage compliance. The respondent supported a minimum level of award and a maximum.

A respondent considered that the present structure – a maximum of four weeks' pay – continues to be sufficient and proportionate. Their reasoning included the likelihood that some businesses, particularly small businesses, may be unaware of an employee's statutory rights and their own statutory responsibilities. It then becomes a question of increased education and awareness. The respondent considered that the Tribunal's compensatory regime should be kept proportionate and appropriate when looked at in the round.

The Jersey Advisory and Conciliation Service (JACS) commented that only once in 2023 had the Tribunal awarded the maximum amount of compensation available to it, and that encouragement of employers to comply with their statutory responsibilities might be enhanced by the existence of minimum and maximum award levels.

JACS suggested that the impact on employees of not receiving what are their statutory rights could go further than inconvenience; the effects could potentially include a failure to secure a loan or a mortgage; a lack of accurate completion of a tax return; or a lack of evidence to enable the Customer and Local Services team to accurately assess a claim for benefits.

(b) <u>Findings of unfair dismissal</u>

The Awards Order provides for a scale of compensation for findings of unfair dismissal as set out below. The amount of the award is currently on a scale from up to 4 weeks' pay to 26 weeks' pay, depending on the length of service, set out in this table:

Length of service	Amount of award
Up to 26 weeks	**Not exceeding 4 weeks' pay**
More than 26 weeks but less than 1 year	**4 weeks' pay**
More than 1 year but less than 2 years	**8 weeks' pay**
More than 2 years but less than 3 years	**12 weeks' pay**
More than 3 years but less than 4 years	**16 weeks' pay**
More than 4 years but less than 5 years	**21 weeks' pay**
5 years or more	**26 weeks' pay**

In its original report on zero hour contracts, the Forum recommended that the current lower end of the scale ranges should be reviewed as part of a separate consultation exercise, with a view to increasing the starting point of the number of weeks' pay as compensation for a finding of unfair dismissal.

A point made by a number of respondents in the consultation, with which the Forum agrees, is that the current compensation regime in Jersey is straightforward; certainly when compared to some other jurisdictions.

Some respondents queried why the maximum award of 26 weeks' pay is available to an employee with as little as 5 years' continuous service, with no increase in the award for continuous service beyond that point. They considered whether the Awards Order should be changed to increase the number of compensation bands available for those employees who have, for example, accrued 10-, 15- or 20-years' continuous service.

The argument was made that, in reviewing this aspect of employment legislation, it is necessary and important to bear in mind that the vast majority of businesses in Jersey are small and medium sized enterprises, which may disproportionately struggle with increased levels of award.

In terms of increasing the number of bands depending on length of service, the view was expressed that the perceived unfairness of an employee with 5 years' service receiving the same amount of compensation as one with 25 years' service had the potential to be misleading. This is because the employee with the longer length of service who is unfairly dismissed benefits more than the one with the shorter length of service in terms of the statutory notice period, which would include notice pay and other entitlements, increasing the overall value of the award.

JACS expressed the view that the current system for awards for unfair dismissal enabled an easy calculation of quantum and appeared to work well.

In the view of one respondent, if the maximum levels of award were to be increased, that might lead to more determinations having to be made at the Tribunal and result in fewer settlements before action.

By the same token, it was suggested by another respondent that the current structure of the number of weeks' pay could be replaced by a cap on awards. As an example, the respondent suggested £25,000. Their reasoning is that this would limit the monetary amount of awards to those employees on higher pay, who would usually be in a better position to negotiate a longer contractual notice period, and therefore this should be sufficient compensation for the most senior employees.

Two respondents suggested that the current system is clear and easy for claimants to understand. One respondent also suggested that an "aggravated" element be introduced into the process by which claims for unfair dismissal are adjudicated, where, for example, an employer had not followed a proper disciplinary and appeals process when dismissing an employee.

(c) <u>Compensation for financial loss and hurt and distress in employment-related discrimination cases</u>

The Discrimination Law provides for compensation to be awarded by the Tribunal for both financial loss and hurt and distress in successful employment-related discrimination complaints.

Currently the maximum amount which the Tribunal may award is £10,000 for each complaint of discrimination in any one case, of which up to £5,000 may be awarded for hurt or distress.

Views received by the Forum in its consultation exercise suggested that these figures are not of a sufficient level to encourage employers to take seriously claims of discrimination in the workplace.

The Forum invited further views on whether a cap should continue to be in place, expressed either in terms of weeks' or months' pay (for the financial loss element) and a monetary figure for hurt and distress caused. Alternatively, that an award for financial loss should be uncapped, as happens in the United Kingdom.

Finally, the Forum sought views on whether there is a case for the Tribunal to be able to award a further sum in respect of "aggravating features".

A point made by more than one respondent was the difficulty in judging from the available evidence the extent to which there is (or may be) a need for increased penalties in workplace discrimination cases. They questioned what discrimination is occurring and the severity of it. These issues, together with evidence of the high number of claims that settle before a hearing – so a respondent contended – make arriving at a conclusion quite challenging.

One respondent drew attention to the following commentary from the Tribunal's 2022 Annual Report:

"*Disability discrimination claims accounted for 55% of the overall discrimination issues with claimants most commonly identifying stress, anxiety and depression in their claim forms."*

The Forum shares the view expressed that increasing the maximum level of compensation awards will not necessarily prevent workplace discrimination, but there is an argument that increasing the level may focus the issue more sharply in the minds of employers. As one respondent put it:

"….this might lead to better and more frequent discrimination training and/or employers taking a firmer internal stance in relation to discriminatory behaviour."

This sentiment was echoed by another respondent, who emphasised the need for better education in workplace practices and understanding of the discrimination regime in Jersey, given that discrimination legislation in the Island is relatively recent in the employment context.

One respondent suggested that the award process might more closely mirror that in the United Kingdom, where, as the Forum's consultation document outlined, there is a "banding" structure, with compensation awarded according to the severity of the behaviour complained of.

It was, however, suggested by another respondent that the mechanism in Jersey should be as simple as is required to assist businesses and employees and that the United Kingdom process is too cumbersome and complicated. A contrast was drawn with the systems currently in operation in both Guernsey and the Republic of Ireland, being models of relative simplicity.

Increasing the maximum level of award does, according to some respondents, potentially increase the risk of weak or vexatious claims to the Tribunal. A suggestion from the responses received is that if the maximum award is to be increased, then so should the Tribunal's ability to strike out claims, which is contained in Article 24(1) of the Tribunal Procedure Order. Respondents point out that there is currently a high threshold to be crossed if the Tribunal is to be able to strike out a claim.

The contrary view is expressed, that increasing the maximum level of awards, leading to an increase in the number of claims, *"would not necessarily be a bad thing."* This argument is premised on the suggestion that the Island has probably had too few discrimination claims for behaviours to change.

In addition, the suggestion that there is a risk that higher caps (or no cap) on compensation *"may drive disproportionately higher compensation"* is queried by this respondent, citing the experience in the United Kingdom where, although maximum awards can be very high, average awards in recent years did not exceed a substantially lower figure. Thus, the argument runs, most successful claims, by extension, will not result in disproportionately high awards.

The suggestion is that a cap of two years' pay, as is the case in Ireland, would be likely to satisfy almost all awards.

Another respondent pointed out that the current limit before the Tribunal was put in place to reflect the jurisdiction of the Petty Debts Court and that the present exercise could be a useful opportunity to increase the maximum award in line with the jurisdiction of the Petty Debts Court, which stands at £30,000.

In this respect, one respondent described the current maximum award of £10,000 as *"grossly inadequate as a remedy in the most serious cases"* and that *"discrimination's impact is not less serious on people who suffer it in Jersey than in other jurisdictions."*

Other than that, it has been contended that moving to a system where months' pay is taken into the equation could put at risk the viability particularly of small businesses in Jersey; and also that an uncapped figure may tempt frivolous claims and increasing business costs (see also below).

Another respondent suggested that, to simplify matters, the award could take the form of a lump sum rather than being broken down into compensation for financial loss and hurt and distress.

A contrary view was expressed by another respondent, who flagged the "dual" nature of the current awards regime; an award for financial loss and a separate one for hurt and distress. The respondent supported the continuation of the current regime and that:

"any award that is approached by reference to weekly pay in the employment context is proportionate to the employee's actual wage…..we would support a move towards an increase in the cap for financial loss that refers to a maximum award of a year's pay."

The same respondent suggested that the option identified by the Forum – for a monetary cap to sit alongside the weekly pay element – would be unsatisfactory in the sense that the figure suggested (£30,000) reflects the jurisdiction of the Petty Debts Court, and that compensation awards for acts of discrimination *"have no specific connection to claims for breach of contract".* Claimants and the process, it is said, would be better served by a weekly pay figure alone or a substantially higher capped figure, as is the case in Ireland or the Isle of Man.

One respondent (an SME) said that the availability of access to the Tribunal process and appropriate compensation awards are clearly part of measures to ensure that employers follow good practice through legislative compliance and the promotion of strong and robust internal processes. However, this should not be compromised if increasing the levels of compensation awards would actually encourage improved practice and better employment protection.

A follow-on point by the same respondent is that they have experience of entering into settlement agreements, regardless of the strength or weakness of a complainant's case, because:

"the burden of defending a claim lies not only in the cost, legal representation, potential level of award and management time. An SME may therefore opt to use a compromise agreement to settle a potential claim at an early stage to mitigate the financial risk (which could at the proposed levels of compensation threaten the livelihood of the business and employees".

The same respondent also suggested that a significant rise in compensation awards "*is likely to lead to higher financial expectations of a claimant at conciliation."*

This question was addressed specifically by one respondent in the context of the cost of doing business in Jersey. The point was made that:

"the costs and complexity of managing employment are considerable, with potentially disproportionate effects on smaller businesses. The greater the potential cost of Tribunal claims…..arguably the greater the disproportionate effect on small businesses of operating in Jersey."

In terms of "aggravated awards," in cases where the Tribunal finds evidence of particularly egregious behaviour by an employer, few responses were received.

However, the point was made that in a jurisdiction the size of Jersey, where all Tribunal judgments are reported, this can lead to victimisation if an individual brings a discrimination claim, is successful but then finds they are not able to access alternative

employment. In that context, the respondent argued that the figure of £10,000 *"is clearly insufficient against those future losses."*

(d) <u>The £10,000 limit on contractual claims</u>

In its consultation briefing, the Forum pointed out that the Tribunal is restricted to a maximum sum of £10,000 when making awards in respect of claims for contractual breaches, and again referenced that fact that the jurisdiction of the Petty Debts Court to hear claims is currently £30,000. The Forum invited views on whether to increase this maximum amount and whether that would be justified.

One respondent made the point that the present limit of £10,000 has been in place since 2005, so clearly has not kept pace with increases in inflation and the level of wages. This is said to be particularly important where issues of notice pay or bonus claims are involved. The Forum notes that this aspect of consultation is focused on the Tribunal's ability to make an award at a certain level.

Respondents noted that the present limit of £10,000 has led often to "split claims" where the Tribunal may only hear part of a claimant's complaint because the contractual element exceeds the £10,000 threshold and must be heard either in the Petty Debts Court or in the Royal Court. Respondents judged that the Tribunal is the correct body to resolve most employment matters and increasing the limit would enable more cases to be contained within the Tribunal's jurisdiction.

It should be noted that an amendment to the Employment (Awards) (Jersey) Order 2009 in 2011 provides that the Tribunal has jurisdiction to award a sum of more than £10,000 where the claimant's length of service means that the statutory notice pay (for example) to which he or she is entitled exceeds the £10,000 limit.

A respondent said that serious consideration should be given to increasing the limit beyond £30,000, given that this limit would be less than some employees working their statutory contractual notice period and thus place them at a potential disadvantage in pursuing their claim elsewhere and incurring costs.

In the alternative, another respondent said that the limit should be increased to £30,000 but suggested that for claims of more than £30,000 there should be a "single track" approach, to transfer all elements of a claim to the Royal Court, to avoid split claims where possible.

Another respondent suggested that the Tribunal should have the jurisdiction to award sums to compensate for the claims set out in the Law and that:

"there should be no cap on (for example) the Tribunal's jurisdiction to award a sum for a statutory minimum notice period." The Forum notes that there currently is no cap.

In conclusion, in general most respondents endorsed increasing the maximum award amount to at least £30,000, to reflect the level in the Petty Debts Court and, moving forward, the maximum amount should be reviewed whenever consideration is given to the Petty Debts Court's limit.

(e) <u>Other issues raised during the consultation process</u>

Some respondents raised other issues not directly relevant to the scope of issues covered in the Forum's consultation exercise. Nonetheless, the Forum takes this opportunity to set them out in this report and comments below in its conclusions and recommendations.

The introduction of Tribunal fees in Jersey

Several respondents raised the issue of fees payable to be able to lodge claims at the Tribunal.

Some argued that the requirement to pay a fee to lodge a claim would act as a deterrent to weak or vexatious claims and level the playing field (at least to a limited extent) in terms of the costs of respondents.

One respondent conceded that, as the Tribunal pointed out in its 2022 Annual Report, arguably one of the great strengths of Jersey's Tribunal system is that:

"There is no fee required to submit a claim to the JEDT and there are no costs awarded to either party at the end of the matter."

Another respondent considered it:

"imperative that the potential negative impact on employers in making changes to the Tribunal's regime are carefully considered, as well as the potential benefits to employees and other users of the Tribunal."

Another respondent strongly deprecated the introduction of Tribunal fees, in the following terms:

"It is clear from the UK that fees had a severely detrimental impact on the ability of individuals to bring claims. The majority of claims in Jersey are low earners bringing claims for their basic rights, and they should not have to pay a fee to bring those claims or access the Tribunal."

The introduction of a costs jurisdiction in the Tribunal

One respondent referred to the lack of a costs jurisdiction in the Tribunal. They made the following points:

"….in reality both employees and employers routinely gauge their willingness to bring or defend claims with reference to the economic benefits of doing so. Further, the lack of any costs jurisdiction means that the Tribunal is unable to make any award to recognise a party's unreasonable conduct in proceedings, even if it might wish to do so.

The Tribunal has expressed a view in the case of *Downer-v-LV Care Group Limited & Others [2023] TRE 04*[2]***.*** The respondent concludes:

"….we recognise that a disproportionate costs risk could disincentivise employees from bringing claims. But we would suggest that a regime that allows the Tribunal the discretionary power to award costs in deserving cases would benefit the current system and its users."

The Forum reflects on these and other incidental matters in its conclusions below.

[2] Hyacinth Downer v LV Care Group Limited (1) Gentry (2) Granger (3) (jerseylaw.je)

CONCLUSIONS OF THE EMPLOYMENT FORUM

Introduction

The Forum has considered carefully the views received during its consultation exercise and is grateful for the input of a diverse range of respondents.

The Forum bore in mind the Minister's instruction that it consider whether the current levels of award are fit for purpose and, if not, what level and type of sanction should be available to the Tribunal.

In this regard, the Forum has had uppermost in its considerations the need to balance the interests of employees whose employment rights have been breached with the need to provide appropriate and proportionate compensation for those breaches.

To be clear, the aim of this present exercise has not been to make recommendations for a compensation awards structure that punishes employers for a failure to abide by the law, although the Forum recognises that the need for an effective deterrent for poor employment practices is a factor.

Rather, the aim has been to underline and highlight the need for employers to take seriously their obligations to their employees, and to have processes in place to minimise the risks of breaches, inadvertent or not.

Individual elements of the consultation exercise – conclusions and recommendations of the Employment Forum

(a) **A breach of most statutory rights**

In the Annual Report of the Tribunal for 2022[3], the Chair of the Tribunal made the following observation:

"The high level of complaints relating to non-provision of payslips and employment contracts remains a concern. A significant number of employers are either unaware of their obligations or do not consider them to be a high priority."

In its recently published 2023 Annual Report, the Chair makes further reference to claims for breaches of statutory rights. While the Chair notes a decrease in the number of claims for non-provision of payslips (39 in 2023 compared with 51 in 2022), the number of claims relating to non-provision of an employment contract rose from 31 in 2022 to 37 in 2023. The Chair makes the following observation on non-provision of payslips:

"While the drop in the number of claims is encouraging it still reflects a persistent pattern of unlawful behaviour by a small number of mainly smaller employers."

On the issue of non-provision of employment contracts, the Chair comments:

"As with payslips, non-compliance with the law on employment contracts is more an issue with smaller employers."

The focus of many of the responses has, perhaps inevitably, been on the non-provision of payslips and written terms and conditions of employment. These are, clearly, examples of repeated breaches of the most basic employer obligations and of legislation which has been in force for many years.

[3] r.81-2023.pdf (gov.je) Page 7

The Forum wishes to highlight a number of other statutory rights which are covered in employment legislation, which are also covered at page 4 above. These include:

- the right to request flexible working and the duty of the employer to consider properly any such request and provide written notice of their decision;
- the new right to request a contract of employment which reflects the reality of the employee's working pattern, and the requirement for an employer to provide written reasons for granting (or not granting) the request;
- the right to a daily and weekly rest period; and
- the right to parental and adoption leave.

Employees are entitled to bring a complaint to the Tribunal in respect of breaches of all of their statutory rights.

The Forum notes that employers have a legal obligation to be aware of their duties towards their employees. Guidance and a start-up guide can be found on the gov.je website.[4]

The Forum also notes that JACS has a statutory duty to advise employers and employees on their respective rights and responsibilities under the Employment Law. JACS has done much valuable work in promoting and educating in this area and the Forum would wish to commend JACS and encourage employers, employees' and supporting organisations (such as employer organisations and trade unions) to make full use of the services it offers.

The Forum also notes that the Tribunal offers guidance on the issues it will bear in mind when weighing the level of harm and the appropriate compensation to be awarded.

Recommendation

The current provisions of the Employment Law enable the Tribunal to make an award of up to 4 weeks' pay for a breach of most statutory rights.

The Forum accepts that the Tribunal's ability to exercise its discretion in terms of the level of award is wholly appropriate and the Forum does not seek to express an opinion about the exercise of that discretion. It remains the case, nevertheless, that there continue to be repeated breaches of this most basic aspect of employment legislation, even after nearly 20 years' operation of the Employment Law.

While the Forum accepts that there may be some circumstances beyond an employer's control – for example, if an external payroll provider fails to ensure the timely provision of payslips - it considers that, for the Tribunal to be able to maintain and exercise its discretion across a range of cases of varying severity – for example, where an individual is unable to access social security benefits, housing or a mortgage because they are unable to provide payslips - and as a deterrent effect, the current award limit should be increased.

[4] https://www.gov.je/Industry/BusinessAdviceHub/EmployingStaff/Pages/home;

https://www.gov.je/Industry/BusinessAdviceHub/EmployingStaff/Pages/EmployingStaffStepByStep.aspx

The Forum therefore **recommends** that the maximum number of weeks' pay which a Tribunal may award for a breach of most statutory rights should increase from the current maximum of **four weeks** to a new maximum of **eight weeks**. The compensation scale would therefore run between **zero and eight weeks' pay.**

The Forum considers that acceptance of this recommendation will enable the Tribunal to address both:

- cases where the breach may be a one-off or inadvertent and outside the immediate control of the employer; and
- cases where employers have repeatedly breached the Employment Law which may, in some cases, lead to significant loss to the employee.

It is essential - and the most basic of employer obligations - that employers take all reasonable steps to provide employees with, at the very least, the basic information to which they are entitled under the Law, and that repeated breaches can be met with a wider margin of sanction.

The Forum also notes the existence of the criminal sanction (contained in Article 9 of the Employment Law) for a failure to comply with the requirement to provide written terms and conditions of employment. The Forum reminds itself that the potential abolition of the criminal sanction was considered by the Forum in a 2015 report[5]. The recommendation then was to retain it and the Forum considers that still to be the case, to enable consideration for prosecution by the Attorney-General when particularly egregious examples of breaches of an employee's or a group of employees' statutory rights come to light.

On the other hand, the Forum is of the view that, in the application of Articles 26 to 29 in the Employment Law in relation to enforcement, and bearing in mind the views expressed, consideration should be given to extending the application to cases where an employer has failed to provide a written statement of terms and conditions and/or failed to provide payslips, or has breached other statutory employment rights.

(b) Compensation for unfair dismissal

The table at page 6 above sets out the current scales for compensation for unfair dismissal.

The consultation paper provided detail about the levels of compensation for unfair dismissal available in other jurisdictions. For example:

- In the United Kingdom, the maximum compensatory award for ordinary unfair dismissal is currently £115,115 or one year's salary, whichever is lower.

- In Ireland, an employee can be awarded up to two years' pay as compensation, which increases to a maximum of five years' pay if the employee is dismissed for making a protected disclosure.

- In the Isle of Man, the award is made up of two elements. In the second element (the compensatory award) the award itself may not exceed £56,000 except in certain cases, when the maximum may be increased. The Isle of Man structure

[5] ID Final recommendation - Compensation awards - December 2015.pdf (gov.je)

also provides for an award to be made for injury to feelings, up to a fixed maximum of £5,000.

- In Guernsey, the remedy available is a cash award of up to six months' pay.

The Forum has carefully considered the current award structure in Jersey legislation. The Forum acknowledges the need for an unfair dismissal compensation structure which is as simple and transparent as possible. Safeguarding the simplicity of the current structure was expressed as a priority by respondents to the consultation and was identified as being a significant factor in favour of the current system.

The Forum's view is that the banding arrangements and levels of award need some revision. It is unclear why, for example, the current maximum award should come into effect after as little as 5 years' service. This is a point to which respondents expressly referred as an anomaly which needed addressing.

In determining appropriate compensation limits, the Forum noted that the current statutory figure for a week's pay for the purposes of redundancy payments is £920. This is the average mean weekly wage calculated by Statistics Jersey. The Forum accepts that redundancy entitlement and unfair dismissal entitlement are two separate issues but, nevertheless, considers the current capped figure for redundancy entitlement to be a helpful guide when plotting new banding and award levels, and bearing in mind the provisions that exist in other jurisdictions.

If the current award levels were replicated in terms of an average mean week's pay, then the current maximum unfair dismissal award of 26 weeks' pay would equate to £23,920. This figure is significantly lower than those in both the Isle of Man and the United Kingdom.

In its 2023 Annual Report, the Tribunal noted that there were 89 claims for unfair dismissal out of a total of 232 claims lodged in that year (an increase from 80 claims out of a total of 209 in 2022). Claims for unfair dismissal represented the highest total of claims in 2023.

Recommendation

The Forum considered what changes are necessary in terms of:

- the compensation awards structure itself (the use of years' service as a measure of loss); and
- the various levels of compensation payable

The Structure

Having considered various options, particularly whether there should be a move to a more loss-based system as is the case in the United Kingdom, the Forum concluded that, in the interests of simplicity and certainty, the link between continuous employment and compensation should be maintained. While there are good arguments for a purely loss-based compensation system, the overwhelming view among respondents to the consultation was such as to make it clear that there is little appetite to embark on an entirely new compensation structure.

The Forum **recommends** that compensation continues to be awarded with reference to the number of years' continuous employment.

The Compensation Levels

The Forum then considered whether the current compensation levels are fit for purpose and concluded that, while the current levels may be acceptable, longer periods of continuous employment should be recognised and acknowledged in compensation awards. The Forum therefore **recommends** that the Order should be amended to reflect the following changes to compensation:

Length of service	Amount of award
Up to 52 weeks	**4 weeks' pay**
More than 1 year but less than 2 years	**8 weeks' pay**
More than 2 years but less than 3 years	**12 weeks' pay**
More than 3 years but less than 4 years	**16 weeks' pay**
More than 4 years but less than 5 years	**21 weeks' pay**
More than 5 years but less than 10 years	**26 weeks' pay**
More than 10 years but less than 15 years	**31 weeks' pay**
15 years or more	**36 weeks' pay**

Given that, under the current provisions of the Employment Law, the earliest an employee can lodge a claim for ordinary unfair dismissal (as opposed to an automatic unfair dismissal claim) is after 52 weeks' service, the Forum sees little merit in retaining the present differential between 26- and 52-weeks' service.

Even if a decision were taken in the future to reduce the qualifying period for a claim of unfair dismissal, the Forum considers that the award for the recommended initial length of service is sufficient and appropriate.

Increasing the bands and the number of weeks' pay in the way the Forum is recommending would mean that, using the current average mean week's wage of £920 as an example, the most a successful claimant for unfair dismissal who has more than 15 years' service could be awarded ordinarily would be £33,120, still substantially below the current figures for the Isle of Man and the United Kingdom.

The Forum recognises that the maximum figures will vary according to the circumstances of individual claimants but considers that using the average mean is an instructive guide.

Aggravating factors

The Forum has also considered the issue of cases where the approach and conduct of an employer in dismissing an employee – or group of employees - unfairly was so poor that additional sanction would be merited.

The Forum has concluded that there should be an additional sanction available to the Tribunal for it to use at its discretion and **recommends** that the Awards Order should be amended to provide that, in cases deemed by the Tribunal to be particularly egregious, the value of the number of weeks' pay to which an employee would be entitled by their length of service may be the subject of up to a 25% uplift on the initial award.

(c) <u>Compensation for financial loss and hurt and distress in employment-related discrimination cases</u>

As the Forum's consultation document made clear, current Jersey legislation limits the amount that can be awarded for successful claims for breaches of the Discrimination Law to £10,000 in total, of which up to £5,000 may be awarded for hurt or distress. These maximum amounts apply to each complaint of discrimination in any one case.

Despite the Discrimination Law having been in force for over a decade, discrimination was the single highest category of claim to the Tribunal in 2022, with disability discrimination accounting for over 50% of such claims. Additionally, discrimination on the grounds of the protected characteristic of sex (which includes sexual orientation, gender reassignment, pregnancy and maternity) made up 15% of claims.

In her foreword to the Tribunal's 2022 Annual Report, the Chair made the following comments:

"Of the 82 discrimination claims submitted (out of a total of 209 claims lodged in 2022), 72 were claims of workplace discrimination and 10 were non-work-related claims.

The most common protected characteristic giving rise to a discrimination claim was disability discrimination which accounted for around 55% of all discrimination claims. The second most common characteristic was race at 27%.

Several claimants identified work-related stress and anxiety as giving rise to their disability. The low threshold for the statutory definition of disability means that some employers fail to identify a stress or anxiety issue as a disability and put in place appropriate adjustments. The high level of unfair dismissal claims is linked to the number of discrimination claims as dismissals that are discriminatory are automatically unfair."

In the 2023 Annual Report, the Chair noted a slight increase in the number of claims with a discrimination element (87 claims in 2023 as opposed to 82 in 2022). As in

2022, the highest number were claims for disability discrimination (55 claims which represents 63% of all discrimination claims). The Chair also noted that:

"Most disability claims arise from hidden disabilities such as neurodiversity and mental health issues."

In 2023, of the 87 claims submitted, 16 contained allegations of discrimination in a non-work setting; the rest (71 claims) arose in a work setting.

The Forum has borne in mind the levels of award available in other jurisdictions. In the United Kingdom compensation claims are uncapped, but are assessed against bands which increase in value depending on the severity of the acts of discrimination. In Ireland, an award is expressed in terms of pay or a fixed maximum. In the Isle of Man, an award is based on a maximum amount, plus a maximum for injury to feelings. In Guernsey, the maximum award is based on months' worth of pay and a fixed amount for injury to feelings.

Forum Analysis

Acts of discrimination – of whatever kind - in the workplace are pernicious and wholly unacceptable. They have no place in a civilised society and, as such, should be addressed firmly in legislation. Acts of discrimination have the capacity to inflict lasting physical and mental effects on victims of such discrimination and have the capacity to undermine the Island's reputation. In a community with a relatively small workforce, these negative effects can also extend to the future employment prospects of victims of discrimination.

It is with these factors in mind that the Forum makes its recommendations in relation to awards for breaches of the Discrimination Law.

The Forum takes the strong view that the current limits, which have been in place since 2013, are inadequate to deal with successful claims for discriminatory behaviour in the workplace. Indeed, the Forum noted examples of serious discriminatory behaviour which the Tribunal has encountered and for which it has been unable to award a higher figure for hurt and distress due to the limits placed on it by such a low compensation cap.

As an example, the Forum highlights the judgment of the Tribunal in the case of *Priaulx-v-Valla Ltd*.[6]

At paragraph 73 of the judgment the Deputy Chair came to the following conclusions on quantum:

73. The compensatory awards / damages break down as follows:

[6] Christine Priaulx v Valla Limited (jerseylaw.je)

- *In relation to the failure to make reasonable adjustments (indirect discrimination), the Claimant is awarded £3,750 for hurt and distress. No separate award is made in relation to financial loss;*
- *In relation to being subjected to unfavourable treatment (direct discrimination unpaid sick pay) the Claimant is awarded £9,670.64 (financial loss) and £329.36 for hurt and distress.* ***The award for hurt and distress would have been £3,000 but owing to the jurisdictional limits of the Tribunal in this regard has been reduced as above (the Forum's emphasis)****;*
- *In relation to being subjected to unfavourable treatment (direct discrimination unpaid notice pay) the Claimant is awarded £3,453.80 (financial loss) and £1,500 for hurt and distress; and*
- *In relation to the claim for unfair dismissal the Claimant is awarded £11,052.16.*

Following on from this, the Forum agrees with the number of respondents who noted that the very low cap of £10,000 fails to act as either (a) a deterrent to employers to stop their own discriminatory practices, or (b) an incentive to employers to take seriously the issue of discrimination in the workplace and to train their workforces appropriately.

Recommendations in relation to maximum awards

Financial Loss and Hurt and Distress

The Forum **recommends** that the current award structure - compensation which is split into two elements, namely (a) financial loss and (b) hurt and distress - should remain in place.

Levels of compensation

Given its serious concern that discrimination should not be tolerated in the workplace, the Forum considered very carefully whether to recommend that the future compensation structure should allow for an uncapped amount to be awarded, as is the case in the United Kingdom. The Forum is of the very firm belief that this should be the legislature's ultimate objective.

The Forum concluded, however, that the move from a £10,000 cap to an uncapped system would be too great a step at this time and that an opportunity needs to be given to employers to adjust their internal processes before an uncapped system is considered in the future.

Having decided that a maximum cap continues to be necessary at this time, the Forum then reflected upon an appropriate level of increase. In this regard, the Forum agreed that the objectives were to:

- recognise that discrimination in the workplace can be deeply damaging and cause long-term issues for the victim; and

- encourage employers to take this issue seriously and to prioritise workforce training and a healthy workplace culture which rejects discriminatory behaviour

The Forum considered whether to recommend a maximum cap in line with the Petty Debts Court jurisdiction. However, the Forum unanimously agreed that to do so would undermine the core message that workplace discrimination is considered more serious than a breach of contract and is not acceptable in a civilised society.

In this context, the Forum **recommends** that the maximum joint award for financial loss and hurt and distress should increase from £10,000 to either £50,000 in total, or 52 weeks' pay, whichever is the greater. The Forum **recommends** that the maximum award for hurt and distress should be £30,000.

In reaching its conclusion in relation either to a cap of £50,000 or 52 weeks' pay, whichever is the greater, the Forum has borne in mind that the current average annual salary in Jersey is a little short of £49,000. Including 52 weeks' pay as an alternative in the compensation element would ensure the ability of the Tribunal to make awards of up to a full year's pay for average earners. Introducing the 52 weeks' pay element would also maintain a reasonably high cap for lower income earners and the ability for high earners to be compensated beyond the cap where it is financially warranted.

The Forum also **recommends** that legislation is introduced to provide that these limits are reviewed every three years to reflect changes in the value of a week's pay as set out in the Employment Law and/or changes in policy regarding the uncapped option.

In terms of training and education, the Forum has already highlighted the services that JACS offers, both in terms of the conciliation and settlement of claims and the provision of advice to both employees and employers. These services include advice on work-related complaints and the Forum considers that there can be little excuse for employers – in particular – not to take advantage of the services that JACS offers. Employers must have effective workplace policies in place and a determination to reduce discrimination in the workplace.

Bandings for hurt and distress – principles to be applied

In 2015, the Tribunal – for the first time – considered an award of compensation for hurt and distress, provided for in the Discrimination Law.[7]

In a detailed and forensic analysis of the various claims for discrimination, the Tribunal (at paragraphs 113 et seq) provided guidance on the levels of compensation for hurt and distress that a Tribunal might award, bearing in mind the factors present

[7] Mr R Flanagan v Island Greetings Ltd, Mr Marco Ferreira and Mr Dawid Wozniak (jerseylaw.je)

in individual cases (paragraph 121 of the Tribunal's judgment). The Tribunal noted the existence in the United Kingdom of the "Vento" bands[8], to which the Forum's consultation paper referred.

The Jersey bandings set out by the Tribunal are guided by reference to the current levels of compensation award available to the Tribunal.

The Forum's overriding concern is that the Tribunal is able to do justice to both/all parties, while being able to mark the act or acts of discrimination in a way that takes into account the circumstances of an individual complainant, and which may at the moment be restricted by the current ceiling on compensation awards.

In its judgment in ***Flanagan***, the Tribunal stated at paragraph 118:

> *Notwithstanding that difference [the difference between the UK Equality Act 2010 and the Jersey Discrimination Law 2013 in defining "injury to feelings" (the UK Act) and "hurt and distress" (the Jersey Law)], the Tribunal notes with approval the case of Armitage (1), Marsden (2) and Prison Service (3) v Johnson [1997] IRLR 162 where the Employment Appeal Tribunal established the following principles that should be applied by Tribunals when determining the level of awards for injury to feelings:*
>
> *(1) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the discriminator. The Tribunal should remain objective of their personal feelings of indignation at a Respondent's conduct.*
>
> *(2) Awards should not be too low, as that would diminish respect for the policy of anti-discrimination legislation. The Jersey legislature has condemned discrimination and awards must ensure that it is seen to be wrong. However awards should be restrained since awarding sums of compensation which are generally felt to be excessive can do almost as much harm to the policy, and the results which is seeks to achieve, as awards that are too low.*
>
> *(3) Awards for injury to feelings should bear some broad similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards rather than to any particular type of personal injury award.*

[8] https://www.bailii.org/ew/cases/EWCA/Civ/2002/1871.html; Vento-bands-seventh-presidential-guidance-April-2024-addendum.pdf (judiciary.uk)

(4) Tribunals should bear in mind the value in everyday life of the sum that they have in mind. This may be done by reference to purchasing power or earnings.

(5) Tribunals should remind themselves of the need to maintain public respect for the level of awards made.

(d) The £10,000 limit for breaches of an employee's contractual rights

As noted above, the consultation responses indicated a view that employees should now be able to bring breach of contract claims with a value in excess of £10,000 to the Tribunal. The current limit of £10,000 has been in place since 2005 and, the Forum understands, was set at that level to reflect the Petty Debts Court jurisdiction.

The Forum **recommends** that the limit be increased from £10,000 to £30,000, to place it back in line with the jurisdiction of the Petty Debts Court and that, in the future, legislation should provide that the limit should be increased whenever the Petty Debts Court limit is increased.

The Forum considers that the Tribunal is the appropriate body to resolve most contractual employment disputes and that raising the limit to £30,000 would enable most claims to be contained within the Tribunal's jurisdiction. This, in the Forum's view, is preferable to the cost to the users of continuing with a structure which regularly requires higher value contract claims to be diverted to another court's jurisdiction.

Other recommendations for change

The Forum has taken the opportunity of this exercise to consider other issues not directly related to the compensation awards regime, but which were raised by respondents and on which the Forum considers it important to express a view.

(i) Anonymisation of Tribunal judgments

As the law currently stands, there is no formal provision in the Tribunal's rules of procedure for its judgments to be anonymised. The Forum **recommends** that the rules be amended so that, in appropriate cases as the Tribunal sees fit, it may anonymise its judgments.

The Forum's view is that, in such a small jurisdiction and labour market, it may, in some circumstances, disadvantage an employee's future employment prospects for their details to be made public. The Forum considers that the Tribunal should have greater powers to redact judgments in circumstances where it finds there is a real risk of harm or disadvantage to an employee (or, in some cases, to an employer).

The Forum notes the remarks of the Deputy Bailiff in the case of ***Jersey Gems-v-McMurray***[9]. As a postscript at paragraph 44 of his judgment, the Deputy Bailiff wrote:

"I have agreed that this is published as previous judgments in this case have been published and this decision of the Royal Court on appeal in an employment case. I do think some consideration needs to be given as to whether or not all decisions of the

[9] Jersey Gems v McMurray 22-Jul-2021 (jerseylaw.je)

Tribunal need to be published and, if they do, the extent to which, if at all, they can or ought to be anonymised.

Jersey is a small jurisdiction and judgments, now that they are widely publicised, remain easily accessible for protracted periods after publication and, indeed, may be available indefinitely. In cases such as this, where both parties have acted in good faith and no adverse findings have been made in respect of either, some consideration ought to be given as to the public interest in identifying both parties – one, an employer of in a very small business and, another, a young woman starting out on her career, or to circumstances where no findings are made or unfounded allegations are advanced of a nature where it would be unnecessary or inappropriate to identify the parties.

This was not a point that was argued in this case, but I would invite the Tribunals and Courts considering similar cases to give consideration to this matter. I understand that in the early days of the Tribunal's existence it was thought appropriate to publish some or all of the Tribunal's decisions in order to establish a significant body of case law. That has now been achieved and, indeed, any points of law which arise from a particular decision can, in any event, be reported with the facts, so far as relevant suitably redacted. In the event, as I have said, this is a matter upon which I did not make a ruling but, in my view, requires some further thought."

(ii) The introduction of a costs jurisdiction in the Tribunal

In cases where a party - either claimant or respondent - has acted unreasonably or vexatiously, the Forum supports the introduction of a costs jurisdiction in the Tribunal.

The Forum **recommends** that a limited costs regime should be introduced to sanction or deter vexatious claims and conduct. The Forum emphasises that the regime should be strictly limited to what the Tribunal deems to be vexatious claims or in circumstances where a respondent's conduct, in the view of the Tribunal, requires a sanction.

Any sanction should not apply, for example, in cases where an employee's claim did not succeed, but it was quite legitimate for the claim to be brought in the first place.

(iii) The introduction of fees for lodging claims in the Tribunal

The Forum is of the unequivocal view that fees should not be introduced, or contemplated, for a claimant to be able to bring a claim to the Tribunal. The Forum agrees with the views of respondents to the consultation that to do so would represent an active barrier to justice for those pursuing small claims of limited value, which account for the majority of cases before the Tribunal.

In the Forum's view, the appropriate way to deal with claims or responses that lack merit or are vexatious in nature is through the ability of the Tribunal to exercise a discretion to award costs against an offending party (see above).

(iv) Time limits for lodging claims

As part of the consultation process, at least one respondent raised the issue of the time limits currently applicable to lodging claims before the Tribunal.

At present, claimants have 56 days in which to lodge a claim and respondents have 21 days in which to lodge a response to that claim. In respect of claimants, the suggestion has been mooted that the 56-day limit be increased to 90 days.

The Forum is not persuaded that this is a justifiable step. The experience of the Tribunal is that claimants invariably wait until just before the expiry of the deadline to lodge a claim. In the Forum's view, extending the limit to 90 days will simply elongate the process, to the disadvantage of both claimants and respondents and the Tribunal system. The Forum does not accept the suggestion that by lengthening the time limit to file a claim, there would be an increase in the number of claims.

In the Forum's view, it is of more importance that claimants understand how the process works and JACS will have a role in continuing to extend its reach into the community to ensure increased awareness.

By contrast, the Forum considers that the current limit of 21 days for an employer to respond to a claim is insufficient. The Forum believes that this is an unreasonably short period of time to:

- receive the claim (often without warning);
- identify the appropriate recipient;
- conduct an initial fact-finding exercise; and
- submit a coherent response.

The Tribunal **recommends** that the time limit for a respondent to file a response form be increased to 28 days, which is in line with the timeframes in the United Kingdom.