



Unite Amicus Section response to the draft Codes of Practice to be issued under the Employment Relations (Jersey) Law, 2007

This response is submitted by Unite Amicus Section. Unite is the UK's largest trade union with 2 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local government, education, health and not for profit sectors.

1. Introduction

1.1. The context in which this response is made is that the bases upon which the codes of practice have been produced is fundamentally flawed following the findings of the International Labour Organisation, (ILO), in relation to the failure of the Employment relations (Jersey) Law (ERL) to meet the core labour standards established under ILO Conventions 87 and 98.

1.2. In the report of the ILO following its investigation into the complaint made by the Transport & General Workers Union¹, (now the Unite TGWU Section) it is said²

¹ ILO Committee on Freedom of Association Report No. 346 (Vol. LXXXVX 2007 Series B No.2)

² Paragraph 1490

“a code cannot be approved that contravenes an international obligation that is binding on Jersey.”

With this in mind, the codes clearly cannot be approved.

1.3. Relevant conclusions of the ILO report are set out below:

- *Registration*

1530. ... The Committee considers that the ERL must be more precise, to avoid any confusion and specify, as the Government indicates, that the Registrar may only consider the express purposes of the union as set forth in its constitution or clear criminal acts that are not covered by the principles of freedom of association in order to exercise its authority under articles 10(1) and 14.

1531. ... The Committee requests the Government to take measures to ensure that a union remains registered until a final decision has been taken by a judicial authority. Furthermore, ... The Committee requests that the Government will ensure that the Royal Court may fully review the substance of cases on appeal.

- *Right to strike under the ERL*

1532. ... The Committee recalls that the right to strike is one of the essential means through which workers and their organizations may promote their economic and social interests and is an intrinsic corollary to the right to organize protected by Convention No. 87 [Digest, op. cit., 2006, paras 522 and 523]. Moreover, the Committee recalls in this regard that no one should be penalized for carrying out or attempting to carry out a legitimate strike [Digest, op. cit., 2006, para. 660]. ... the Committee expects that the Government will ensure respect for these principles and guarantee that workers are not sanctioned for carrying out legitimate trade union activity and ensure effective protection against any retaliatory acts aimed at penalizing workers for exercising trade union activity.

- *Definition of an employment dispute*

1534. ... The Committee recalls in this respect that according to the principle of free and voluntary collective bargaining embodied in Article 4 of the Convention, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and that, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority [Digest, op. cit., 2006, para. 988]. The Committee further notes that it would appear that an agreement between an employer and a trade union that does not represent a “substantial proportion of the employees engaged in the trade or industry concerned” would not qualify as a “collective agreement” within the law, whereas such agreement should be possible where no union has met the representativeness requirement.

1535. *The Committee recalls that for a trade union at the branch level to be able to negotiate a collective agreement at the enterprise level, it should be sufficient for the trade union to establish that it is sufficiently representative at the enterprise level [Digest, op. cit., 2006, para. 957]. ... Moreover, the Committee recalls that where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining should be granted to all unions in this unit, at least on behalf of their own members [Digest, op. cit., 2006, para. 976].*

1536. *... The Committee considers that the definition of protected industrial action should not be such as to render strike action virtually impossible and requests the Government to take measures to ensure that industrial action is protected even in the absence of a pre-existing collective agreement.*

1537. *... the Committee considers that the requirement that the employer employs at least 21 employees for a recognition dispute to qualify as a collective dispute, and therefore permit a strike, should also be removed as it is clearly in violation of the principles of freedom of association.*

- *Resolution of collective disputes*

1539. *... the Committee considers that the declaration's de facto and de jure integration in individual contracts of employment is tantamount to compulsory binding arbitration contrary to the principle of voluntary negotiation. It requests the Government to ensure that such declarations are only possible in the case of essential services in the strict sense of the term, public servants exercising authority in the name of the State or where both parties agree to binding arbitration.*

- *The codes of practice*

1541. *... the Committee observes the allegations concerning an exemption for small businesses employing ten or fewer employees from the right to form trade unions and stresses that, if envisaged, this would clearly be in contravention of Article 2 of the Convention which states that all workers without distinction whatsoever have the right to establish or join an organization of their own choosing.*

1542. *... The Committee recalls that the obligation to give prior notice to the employer before calling a strike may be considered acceptable [Digest, op. cit., 2006, para. 552], but considers that the information asked for in the notice should be reasonable, or interpreted in a reasonable manner, and such injunctions should not be used in such a manner as to render legitimate trade union activity nearly impossible.*

1543. *... The Committee recalls that a ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association. Furthermore, a general prohibition of sympathy strikes could lead to abuse and workers should be able to take such*

action provided the initial strike they are supporting is itself lawful. More generally, the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests [Digest, op. cit., 2006, paras 538, 534 and 531]. The Committee requests the Government to take the necessary measures to ensure that sympathy strikes and social and economic protest action are protected under the law.

1544. Regarding picketing and code 4, the Committee notes the fact that picketing is not protected from civil suits such as "obstruction of a path, road, entrance or exit to premises; interference (e.g. because of noise or crowds) in the rights of neighbouring properties (i.e. private nuisance) and trespassing on private property". The Committee stresses that it considers legitimate a legal provision that prohibits pickets from disturbing public order and threatening workers who continue work [Digest, op. cit., 2006, para. 650]. The Committee does, however, consider that the action of pickets organized in accordance with the law should not be subject to interference by the public authorities [Digest, op. cit., 2006, para. 648].

1.4. The Committee reminded the Government that it may avail itself of technical assistance from the Office in respect of the matters raised in this case. Had it done so, the draft codes would not be approved.

1.5. Further, the codes as they now stand are worse in effect and in terms of prohibiting effective action than those considered in the context of the ILO report. One example would be in relation to "essential services". Paragraph 1497 refers to code 4 and limits on industrial action, which deals with three proposed limits: essential services, secondary action and picketing. The complainant dealt particularly with the last two. However, the definition of "essential services" in the code is unacceptably broad to Unite Amicus Section as well as to the ILO and other international bodies concerned with collective rights.

1.6. Another issue that could be referred to the ILO should be in relation to a union that chooses as one of its purposes to act in breach of domestic law, whenever this is appropriate to seek or promote change to implement the effect of international human rights and standards, such as those contained in ILO Conventions 87 and 98. This would

deprive the union of registration under the ERA, even if the ILO's conclusions were otherwise followed by the Government.

1.7. The Codes of Practice are legally binding to restrict trade unions by means of Article 20 (2) (b) and (3) (b). The effect of the codes of practice is therefore very significant. The provisions of the draft codes on balloting and in relation to "reasonable conduct" are proscriptive and unacceptable to Unite Amicus Section as well as the ILO and other international bodies concerned with collective rights. The codes are not capable of addressing the recommendations made by the ILO. It is difficult therefore to see how consideration has been given to Jersey's international obligations as stated in the introduction to the codes (para 4).

2. Code 1 The recognition of trade unions

2.1. Trade Union Recognition

2.1.1. Unite Amicus Section is concerned that this code, in addressing the arrangements for trade union recognition, requires a trade union to be registered. However, an employer can avoid the statutory arrangements by recognising a union that is unregistered and/or dependent. Concerns over registration have been referred to elsewhere and include that the registration provisions do not provide for any independence of decision and provides the Registrar with powers to cancel registration of his or her own volition and requires cancellation in certain circumstances.

2.1.2. Unite Amicus Section agrees that recognition should wherever possible be secured on a voluntary basis but recognises that this is not always achievable. The process outlined in this code to deal with circumstances where a voluntary agreement is not achievable falls short of those required to meet basic rights set out in international agreements.

2.1.3. Unite Amicus Section opposes the exemption of employers with less than 21 employees (or any other small employer exemption) from this process in line with the recommendation by the ILO³.

2.1.4. A declaration of recognition should be wider than pay, hours of work and holidays, and Unite Amicus Section believes, should expressly include pensions, training and all other working conditions. We also refer to the list at Article 5 (2) of the ERL.

2.1.5. Trade union recognition should be encouraged and provided for even if the majority of employees are not in favour. Unite Amicus Section agrees with the proposition that collective bargaining should be granted to unions at least on behalf of their own members. This complies with the spirit and intent of ILO Convention 98⁴.

2.1.6. Unite Amicus Section rejects the criterion outlined in the section determining the composition of the bargaining unit which provides for an employer to reject a claim for recognition for a bargaining unit where the employer already recognises one or more trade unions for the purposes of collective bargaining. In the absence of an independent registration system for trade unions such a criterion leaves genuinely independent trade unions open to unfair treatment. This has occurred, for example, in the UK case of Prison Officers' Association and Securicor Custodial Services Ltd⁵ (and see NUJ v CAC⁶).

³ See page 3 above and paragraph 1537 of ILO Committee on Freedom of Association Report No. 346 (Vol. LXXXVX 2007 Series B No.2)

⁴ See CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) United Kingdom (ratification: 1950) Published: 2007 <http://www.ilo.org/ilolex/gbe/ceacr2007.htm>

⁵ http://www.cac.gov.uk/recent_decisions/Decision_texts/Securicor%20&%20POA%20Decision.htm

⁶ [National Union of Journalists, R \(on the application of\) v Central Arbitration Committee & Anor \[2005\] EWCA Civ 1309 \(21 July 2005\)](#)

2.2. Tribunal Jurisdiction

2.2.1. Determination of the bargaining unit may be referred to a tribunal but only if both parties agree. If the employer refuses to agree to such a referral the process to determine recognition continues and if a dispute subsequently arises the employer can challenge the bargaining unit at that time. This process, in the view of Unite Amicus Section, is unwieldy and should be amended to allow either party to refer a dispute over the bargaining unit at an earlier stage.

2.3. Seeking Recognition

2.3.1. In determining the wishes of the workforce, the code again fails to meet international standards. Indeed the provision of requiring at least 50% + 1 of the workforce to participate in order to create a valid ballot is a further contravention of international standards of labour law. Unite Amicus Section notes that this provision is even harsher than that applicable in the UK. The UK law has been criticised as unacceptable by the ILO Committee of Experts in July 2007⁷ and Unite Amicus Section is opposed to the provision in the Jersey Code.

2.4. Recognition Ballots

2.4.1. There is no adequate sanction to apply to an employer who refuses to work with the union to ensure that a fair ballot is held, nor if the employers fail to respect the right of employees to vote as they wish, nor if the employers threaten a penalty or give incentive for voting against union recognition.

⁷ CEACR: Individual Observation concerning Right to Organise and Collective Bargaining Convention, 1949 (No. 98) United Kingdom (ratification: 1950) Published: 2007 <http://www.ilo.org/ilolex/gbe/ceacr2007.htm>

2.5. Access prior to the Ballot

2.5.1. In regard to the section of this code on access prior to the ballot, Unite Amicus Section is disappointed to note that the provisions governing this process are unclear and restrictive upon the trade union and fails to address the unfair practices so often encountered where employers seek to undermine trade union recognition. There are no adequate sanctions to apply to those employers who behave badly.

2.6. Conduct of a Recognition Ballot

2.6.1. Similarly there are no adequate sanctions to apply to those employers who behave badly in relation to the conduct of a ballot.

2.7. The Recognition Agreement

2.7.1. Unite Amicus Section has not seen the 'model "Recognition Agreement"' and cannot comment on its adequacy. The union has already stated its views on the scope of issues which should be covered in such an agreement.

2.8. De-recognition

2.8.1. In the section on De-recognition, Unite Amicus Section has two concerns. First, that such a provision should exist at all giving employers the encouragement to remove recognition and, second, placing upon trade unions the burden of proof without any similar requirement placed upon the employer.

2.8.2. In the paragraphs on the role of the Jersey Employment Tribunal in adjudication in recognition disputes the code is unclear about both the scope and power of enforcement of the Tribunal declaration and this needs to be addressed.

2.8.3. Unite Amicus Section refers to earlier observations concerning the unacceptable “small employer” exemption.

2.9. References to the Jersey Employment Tribunal

2.9.1. A declaration by the JET as to unreasonable behaviour or for recognition lacks sufficient and effective sanction to make employers comply. An improvement would be to seek a further declaration that an employer who did not improve behaviour or give effect to recognition was in contempt and subject to unlimited fine and imprisonment of those in the business who were responsible for such contempt until they complied.

2.9.2. These failings are compounded in the context of laws that require there to be a collective agreement in force for there to be any effective action for the protection of the interests of employees and other workers.

3. Code 2 Balloting and conduct in employment disputes

3.1. This code is again based on a fundamentally flawed process of registration. In addition the absence of a positive right to withdraw labour or take other action is clearly criticised by international bodies⁸. In the absence of a positive right, there must be much greater care taken to give effect to and preserve immunity than is available under the ERA and the codes of practice. In this regard the Jersey laws would not comply with international obligations.

3.2. The balloting procedures are unacceptably restrictive.

⁸ The International Covenant on Economic Social and Cultural Rights clearly requires a positive right to strike: http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

- 3.3. Also throughout the code the term “unreasonable conduct” is liberally used to remove immunity in an employment dispute. However, the code provides definitions which are unduly wide and prohibitive and in some instances lack clarity.
- 3.4. The degree of uncertainty as to the existence of the immunity in any given circumstances is also unacceptable. Workers will take action at their peril and at risk that a court may find that their behaviour is unreasonable under the code. They may face unemployment, substantial loss, bankruptcy and even imprisonment as a result. The union is also in a similarly precarious position. This is unacceptable according to international standards and Jersey’s international obligations.
- 3.5. The burden of resolving employment disputes falls upon the trade unions without the same requirement being placed on the employer. For example, a trade union would be guilty of “unreasonable conduct to take action in furtherance of an employment dispute without first making reasonable attempts to resolve the dispute through negotiation.” Immunity would also be lost if the union took action prior to the exhaustion of any internal dispute resolution procedure; the union would also be guilty of unreasonable action if it failed to use the services of Jersey Advisory & Conciliation Service (JACS) prior to any action. No similar burdens are recognised for the employer.
- 3.6. Unite Amicus Section notes again that there are no effective sanctions in relation to employers who threaten or intimidate employees, or otherwise behave unfairly in relation to a ballot for action. There is no mention of personal incentives to affect the outcome of a ballot by employers being inappropriate.
- 3.7. Breaches of the code in relation to picketing that amount to “unreasonable conduct” deprive the union of immunity.

- 3.8. Immunity is lost for individuals for conduct including obstructing a path, private nuisance such as noise or trespass on private property. This is unacceptable to Unite Amicus Section, the ILO and others.
- 3.9. It is understood that collective agreements are not legally enforceable and yet the blanket restriction on a union taking effective action in support of a reasonable need to amend an agreement in the light of changing circumstances is unacceptable.
- 3.10. The code also places unreasonable restrictions on the ability of trade unions to act with immunity in areas of “essential” services. The definition of essential services is unclear but in the example given would appear to include all transport services. This is clearly not contemplated by the ILO report when it refers to “*essential services in the strict sense of the term*”.
- 3.11. Elsewhere in the draft code notice of action in the case of essential services must be at least 20 days from the date of the result of a valid ballot. This in itself confuses the test for immunity in such cases.
- 3.12. The inability for trade union members to undertake action in support of workers in another workplace is in breach of international standards and the arguments in support of this are contained in the findings of the ILO investigation into the TGWU complaint. Secondary action should be permitted. This is another ground on which the Jersey Codes of Practice fail to comply with international obligations⁹.
- 3.13. Unite Amicus Section regards the restrictions on industrial action being called whilst a collective agreement is in force as unreasonable. As currently worded this section effectively prevents a trade union

⁹ See for example: [CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 \(No. 87\) United Kingdom \(ratification: 1949\) Published: 2007: http://www.ilo.org/ilolex/gbe/ceacr2007.htm](http://www.ilo.org/ilolex/gbe/ceacr2007.htm)

from calling for action in any circumstances other than where an employer acts in breach of an existing agreement. This is an unreasonable restriction on the lawful activities of a trade union and as such is in breach of international standards.

3.14. Protection from dismissal is inadequate under the code and the law to satisfy Jersey's international obligations.

4. Code 3 Resolving collective disputes

4.1. This code again makes clear that parties must conclude any agreed resolution of disputes procedures before action can be taken. The burden for failure to do this falls entirely upon the trade union which will be found to have acted unreasonably if it has failed to follow the agreed procedure. The code makes no reference to what should happen or the sanctions applicable in the event that the employer fails to follow the agreed procedure. This is a serious omission.

4.2. The list of matters in relation to which there can be a "collective employment dispute" is inadequate in the context of the ERL and codes to comply with Jersey's international obligations.

4.3. It is perverse to require a collective agreement to be in force, which following Code 1 is likely to cover only pay, hours and holiday and yet to require the union to negotiate with an employer before action can be taken in relation to a dispute over working conditions, for example.

4.4. Unite Amicus Section regards the reference in this code to mediation or conciliation leading to "non-binding" agreement as contradictory and unclear.

4.5. That a union may not withdraw consent to a Tribunal issuing an order is unacceptable. Delay of itself may be justification. The facility by the employer to refer a matter to the JET and the effect of it is

unacceptable to Unite Amicus Section and fails to meet Jersey's international obligations.

5. Conclusion

5.1. Unite Amicus Section repeats its assertion that these codes of practice fail to address the fundamental failures of the Employment Relations (Jersey) Law 2007 to introduce legislation which adheres to recognised international standards and that the codes compound such failures.

5.2. The union believes that substantive redrafting of these codes would be necessary in order to redress some of the failings of the legislation and they would require to be given legislative status. Their current status and content do not, in the opinion of the Unite Amicus Section, meet the obligations placed upon Jersey by the international conventions referred to in para 4 of the introduction to the codes.

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