



**Unite the union response to Public Consultation on
Draft Employment (Amendment NO. 4) (Jersey) Law 200-
April 2008**

This response is submitted by Unite 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.

Unite represents the largest proportion of trade unionists in these sectors on Jersey.

Executive Summary

- Unite the union agrees that it is an improvement to Jersey law to introduce provisions for **reinstatement and re-engagement**. However, for reasons given below, the current draft amendment to the principal Law does not make the most of the opportunity to introduce effective provision that serves the interests of justice and the reason for introducing such provision.
- Unite does not support the introduction of the concept of contributory conduct in reducing awards for unfair dismissal.
- Furthermore, the specific provisions are flawed in that they allow an employer to raise issues of conduct unrelated to the dismissal. As drafted the provisions will cause significant problems in relation to the conduct of proceedings. They are unjust, and do not reflect the position in the UK. The

draft provisions also do not appear to follow the introductory comments in the report to the amendment and would result in a contradictory approach in relation to the amendments.

Reinstatement and re-engagement

1. Unite the union agrees that it is an improvement to Jersey law to introduce provisions for reinstatement and re-engagement. However, we note that under the regime in the UK, directions for re-employment are made by tribunals in less than 1% of those unfair dismissal cases where they adjudicate in favour of the employee. Justice and the benefits to society should demand that a more effective law is introduced on Jersey.
2. This is more so for “Jersey is a more restricted employment market than the U.K., making the option of an award for re-employment more relevant and necessary.” as the report to the amendment recognises.
3. However, the amendment as drafted only provides for an additional award, where the employer does not follow the tribunal’s direction to re-employ, of up to 26 weeks (article 77E). Whereas in the UK the additional award is a minimum of 26 weeks and a maximum of 52 weeks (s117(3) Employment Rights Act 1996 (ERA)). Even this is not a sufficient deterrent to employers in the UK to refuse to follow the tribunal’s direction, particularly for those who are low paid and in the light of the limit to a week’s pay of £330.
4. Further, the extent to which the employer has opportunity to argue that they should not be subject to a direction for re-instatement is too great in the interests of justice. Not only does the employer argue that re-employment is impractical before a direction can be made, but a further opportunity arises (when the employer can raise different arguments) before an additional award can be made. Practicality in this context is dependent on the employee contention about business need and this cannot be just.
5. The circumstances in which the remedy arises in the amendment as drafted are not the same as in the UK to the extent that there is doubt and we can anticipate legal challenge. In the UK ERA s112 (2) “The tribunal shall—

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order [for re-employment].” This is a clear explanation of the process to be adopted by the tribunal.

6. However, the draft amendment (77 Remedies) reads:

“(1) Where, on a complaint under Article 76, the Tribunal finds that the grounds of complaint are well-founded it shall, if the complainant wishes, consider whether to make a direction for continued employment under Article 77A.”

It is not clear whether the tribunal has a duty to ascertain the complainant’s wishes.

7. Unite the union also believes that the opportunity should be taken to use the option of interim relief, whereby the efficacy of re-employment is significantly enhanced by an early direction pending a substantive decision. These should be considered in wider circumstances than in the UK, where interim relief may be sought by pension fund trustees, health and safety representatives and those dismissed in relation to trade union membership and activity.

Contributory conduct

8. Unite the union does not favour the introduction of reductions of awards following analysis of contributory conduct by a tribunal at the behest of the employer. Too often in the UK a decision that a dismissal was unfair is undermined by such a reduction. In principle if dismissal was inappropriate as an option in the context of the circumstances and the law, then it should not have occurred and the complainant should be put in a position (by re-employment or compensation) as though the dismissal had not happened.

9. Further, Unite notes that the amendment as drafted goes beyond the circumstances in which consideration of contributory conduct takes place in the UK. The introduction to the report on the amendment is misleading. This

states that the amendment seeks to introduce “The power to reduce an unfair dismissal award where an employee is found to have contributed to their own dismissal (in specified circumstances)”.

10. However Article 77F(5) provides for a reduction if: “The Tribunal considers that any conduct of the complainant before dismissal (or, where the dismissal was with notice, before the notice was given) was such that reduction of the award is just and equitable.” This is not limited to conduct which contributed to the dismissal. Article 77F(6) confirms this interpretation, as it provides that “For the purposes of paragraph (5), the Tribunal *may* take into account conduct committed whilst in employment which came to light after notice was given or the act of dismissal occurred where such conduct is related to the circumstances giving rise to the notice being given or the act of dismissal taking place.”
11. Employers will raise all conduct relating to an employee who has been dismissed even if it does not relate to the dismissal. Surely tribunal hearings would not benefit from extensive allegations and defence of allegations about all conduct?
12. By contrast the UK’s ERA 1996 s123(6) states that: “Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”
13. In this context the amendment as drafted is also inconsistent with draft Article 77D (which reflects ERA s116). “In exercising its discretion under Article 77A(a), the Tribunal shall take into account –
 - (a) whether the complainant wishes to be reinstated;
 - (b) whether it is practicable for the employer to comply with a direction for reinstatement; and
 - (c) where the complainant caused or contributed to some extent **to the dismissal**, whether it would be just to direct the reinstatement.” There is a similar provision in relation to re-engagement.

14. Thus, it is rightly not possible to take account of conduct which is not relevant to the dismissal in relation to consideration of a direction for re-employment, but it is possible to do so in relation to consideration of a reduction.

15. Unite would also wish to see clear provision to the effect that some alleged misconduct cannot be regarded as contributory conduct. In the UK this is limited to refusing to join a trade union, joining a trade union or refusing to desist from taking part in union activities (under Trade Union and Labour Relations (Consolidation) Act 1992 s155) and participation in lawful industrial action (*Crossville Wales Ltd v Tracey* (No. 2) 1997 IRLR 691 HL).

Conclusion

- Unite the union welcomes this opportunity to put forward its views and make constructive comments.
- Unite would be more than willing to explain further and engage in further consideration of the issues.

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