

## Channel Islands Employment Law Update - September 2021

Insights - 01/09/2021

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### Jersey

#### Should all Jersey Employment and Discrimination Tribunal cases be published?

In the recent appeal decision of the Royal Court of Jersey in *Chenny Aouane Jersey Gems v Cheyenne McMurray*<sup>[1]</sup>, the Deputy Bailiff, Robert McRae (QC), commented that the practice of publishing all of the decisions of the Jersey Employment and Discrimination Tribunal (the Tribunal) "*require[d] some further thought*".

In postscript comments, the Deputy Bailiff referred to his understanding that, upon the Tribunal's inception, an aim had been to establish a significant body of case law, which he considered had now been achieved.

In the present case, the appellant employer was penalised by the Tribunal, which sanctioned the employer unaware when it sat that a claim for unpaid wages had already been paid to the satisfaction of the former employee.

The Deputy Bailiff commented that consideration needs to be given as to whether or not all decisions of the Tribunal need to be published and, if they do, the extent to which, if at all, they can or ought to be anonymised. It will be interesting to see whether these comments are taken forward by those responsible for legal system reform in Jersey. A range of issues may need to be considered, including human rights and data protection, potentially. Certain rules regarding judgments of the Tribunal relating to privacy and restrictions on disclosure are already provided for by Order<sup>[2]</sup>. The publication of court and tribunal judgments are considered by many legal systems to be a fundamental facet of citizens' access to justice. On the other hand, many judgments of the Tribunal do not deal with novel points of law and address well established principles and minor technical breaches of the law.

#### Working controls: relaxation of restrictions for second jobs

In response to cross-sector skill shortages, the Government of Jersey has temporarily relaxed certain rules that apply to people that have Licensed or Registered status.

Licensed persons are approved by the Population Office as 'essentially employed'. Registered persons have less than 5 years' continuous residency. A prospective employer can only engage a Licensed or Registered person if it has secured an appropriate permission from the Population Office for the post in question.

For the period 5 August to 31 October 2021, Licensed and Registered persons may work for a second business. That engagement won't count toward the second business' maximum numbers of Licensed or Registered persons that are permitted to work for it. The second business must take reasonable steps to ensure that, for the duration of the engagement, the Licensed or Registered person continues to work for the first business for an average of no less than one hour per week.

The measures have been implemented in consultation with the Chamber of Commerce to provide short-term support to seasonal businesses that rely on the recruitment of migrant workers (primarily in the hospitality and agriculture sectors) in response to the challenges presented by COVID-19 and Brexit. The intention is to enable businesses to utilise the skills of those already working in Jersey who are willing and able to work extra hours, without having to apply for additional registered or licenced permissions.

Business should note that, during this period, registered and licenced workers must continue to comply with any immigration requirements (eg work permits).

#### **Proposed change to collection of social security contributions for part-time staff**

Currently, Jersey employers collect and pay contributions for any employees that work more than eight (8) hours per week.

Subject to States approval, from 1 January 2022, employers will instead pay contributions for any employees that earn above a certain amount; replacing the eight-hours-per-week rule. This means that businesses will need to ensure that for any employee who is paid above the earnings threshold - irrespective of their working hours per week - registration cards are held on file, the employee is included on the employer contribution schedule and contributions are collected and paid on the employees' behalf.

Initially, the minimum earnings threshold will be set so that it is equivalent to working 8 hours a week at the minimum wage. For information, the threshold today would be £289 per month or £66 per week. This change has been proposed to make it easier for employers to collect Social Security contributions for part-time employees and report information to the government for contributions, income tax and manpower requirements, through a new combined employer return.

It is anticipated that the proposals will be debated in the States on 14 September 2021. We will keep you updated.

#### **COVID-19 business support extended for autumn and winter**

Jersey's Government has confirmed that financial support for local businesses will be extended into the autumn and winter following the third wave of Covid-19 infections and the delay to Stage 7 of the reconnection programme. The support schemes will be extended as follows:

- the Co-Funded Payroll Scheme will be extended until September 2021 for all sectors that already qualify. The scheme will also be available to wholesale/retail and health and wellbeing businesses
- the Fixed Cost Support Scheme for businesses connected to the events sector will be extended until March 2022
- the Fixed Cost Support Scheme for close-contact personal services businesses (eg health and beauty) will be available until September 2021
- the Visitor Attraction and Events Scheme will be extended until March 2022
- the Visitor Accommodation Support Scheme will be extended until March 2022.

#### **Additional public holiday in Jersey on Monday 27 September**

Monday 27 September 2021 will be a one-off public holiday in Jersey. This is to commemorate 250 years since the political reform following the Corn Riots.

To meet the requirements of the Jersey's employment legislation, businesses should be aware that any employee for whom Monday 27 September is a normal working day will be entitled to a day's holiday with pay or, if an employee is required to work on that day, they should receive a normal day's pay and an alternative day off in lieu.

#### **Annual increase in statutory redundancy pay**

Following the release of the latest average earnings figures in Jersey, the cap on weekly pay for the purpose of statutory redundancy pay in Jersey will increase in September.

Under the Employment (Jersey) Law 2003, qualifying employees who have two or more years of service are entitled to one week's capped pay for each full year of service.

Statistics Jersey announced last week<sup>[3]</sup> that the mean average weekly earnings of full-time equivalent employees in Jersey has increased from £780 to £820 per week.

This means that the cap on weekly pay for the purpose of calculating statutory redundancy pay will increase to £820 per week. This will apply where the effective date of termination is 28 September 2021 or later. Any business that is planning to make redundancies and calculating the potential payments should take into account this revised figure.

## **Guernsey**

#### **Secondary pension scheme delayed**

A secondary pension scheme - 'Your Island Pension' - was due to be set up in Guernsey and Alderney from January 2022. However, plans have been delayed due to the challenges of Brexit and COVID-19.

The scheme will require employers in Guernsey and Alderney to offer a pension scheme for their employees, if they do not already provide one, and to make contributions of up to 3.5% of salary. Employers can join the "Your Island Pension" scheme, which will be administered by a UK pension provider specialist, or arrangements may be made to provide an alternative qualifying pension scheme.

While some businesses will appreciate this additional time to prepare, many businesses are already making their own arrangements with local pension scheme providers.

A revised implementation date has not yet been announced. We will keep you updated.

#### **Payroll co-funding scheme to close in September 2021**

Guernsey's Government has confirmed<sup>[4]</sup> that the payroll co-funding scheme, which has provided financial support for Guernsey businesses during the Covid-19 pandemic, will be closed on 30th September 2021.

The Travel and Tourism support package provided to businesses affected by the border restrictions, such as event management, visitor accommodation, passenger transport and tourist attractions, will also close at the end of September 2021.

The separate Visitor Accommodation Scheme and the Visitor Attraction Scheme will continue until the end of March 2022.

Guernsey's Government has indicated that while most of the on-Island economy is now able to trade at normal or near normal levels, the situation will be monitored and reassessed in light of any changes in local conditions.

## **UK**

#### **Tribunal decisions relating to COVID-19 measures**

A number of first instance UK Tribunal decisions relating to COVID-19 measures are likely to be of interest to employers in both Jersey and Guernsey. While these first-level Tribunal decisions are not binding on future Tribunals, they provide useful guidance on issues that many businesses are likely to be addressing, including:

- **Whether an employer is obliged to consider furlough before dismissing for redundancy**

For a redundancy dismissal to be fair in all the circumstances of the case, an employer should conduct a fair consultation process and explore alternatives to redundancy. In the case of *Mhindurwa -v- Lovingangels Care Limited [2021]* <sup>[5]</sup> the respondent's failure to actively consider furlough as an alternative to redundancy meant that the decision to dismiss the claimant was found to be unfair.

While redundancy was the genuine reason for the claimant's dismissal (the respondent had no work for the claimant at the time of her dismissal), the UK Employment Tribunal (the UK Tribunal) found that a reasonable employer would have considered whether dismissal could have been avoided by making use of the furlough scheme. The UK Tribunal concluded that this had not been considered (or had not been properly considered) and that the appeal process also failed to consider furlough.

The case highlights that employers should consider all of the circumstances surrounding a potential dismissal and that employers should factor furlough in to any potential redundancies (available in the UK until 30 September 2021). However, it is important to note that the Tribunal found that that furlough should have been properly considered, not necessarily that the employee should have been furloughed.

While 'furlough' does not apply in the Channel Islands, when considering making redundancies employers might be expected to take into account the availability of the Payroll Co-funding schemes that are available to businesses in both Islands until September 2021.

#### **Whether sending a pregnant woman home from work based on government guidance constitutes pregnancy discrimination.**

In the case of *Miss A Prosser v Community Gateway Association Ltd*<sup>[6]</sup>, the claimant notified her employer that she was pregnant shortly before the first UK lockdown. Based on government guidance at that time, pregnant women were considered to be clinically vulnerable and so the respondent sent her home from work on full pay. The claimant claimed sex discrimination.

The UK Employment Tribunal (the UK Tribunal) had to consider whether an employer is liable for sex discrimination if it is following government guidance that is designed to protect pregnant women during the

Covid-19 pandemic. On face value, denying access to the workplace in these circumstances would appear to be 'unfavourable treatment' on grounds of pregnancy and therefore direct discrimination.

The UK Tribunal dismissed the sex discrimination claim on the basis that sending the claimant home was not 'unfavourable treatment'; the employer's treatment of the pregnant employee arose directly from the government's public health guidance. The respondent's decision to pay wages during that period may have contributed to the UK Tribunal's decision.

Employment Tribunals dealing with similar complaints (including the Tribunals in Jersey and Guernsey) are likely to consider whether removing a pregnant employee from the workplace in these circumstances would also form part of the employer's general duty to ensure the health and safety of its staff under the relevant local legislation and whether such treatment would not constitute pregnancy discrimination by virtue of specific exceptions in the legislation (eg for the protection of women, or for the purpose of complying with a requirement imposed by another law).

We would advise that advice is taken in such circumstances. The law in Jersey regarding treatment on grounds of pregnancy and the exceptions to discrimination are different from the UK and Guernsey.

### **Flexible working**

A private member's 'Flexible Working Bill' was introduced to parliament in June 2021 which seeks to give employees the right to request flexible working from the first day of their employment – removing the current requirement for 26 weeks' continuous service – unless exceptional circumstances exist. Employers would also be required to offer flexible working arrangements in employment contracts and to advertise the available flexibility in notices of job vacancies. It is anticipated that more widespread flexible working options would benefit working women in particular. The second reading of the Bill is due to take place in November 2021.

For employees in Jersey, the right to request flexible working is already a 'day-one' entitlement with no qualifying period of employment. Employees may request a change to their hours, times or location of work. However, as in the UK, Jersey employers can justify refusing a request on business grounds.

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[1] [https://www.jerseylaw.je/judgments/unreported/Pages/\[2021\]JRC194.aspx](https://www.jerseylaw.je/judgments/unreported/Pages/[2021]JRC194.aspx)

[2] Employment and Discrimination Tribunal (Procedure) (Jersey) Order 2016

[3] [www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Average%20Earnings%20June%202021%20re](http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Average%20Earnings%20June%202021%20re)

[4] [https://covid19.gov.gg/sites/default/files/2021-08/Business%20Support%20Guidance\\_Extended%20Scheme%20Guidance%2019%20August.pdf](https://covid19.gov.gg/sites/default/files/2021-08/Business%20Support%20Guidance_Extended%20Scheme%20Guidance%2019%20August.pdf)

[5] [https://assets.publishing.service.gov.uk/media/60f025b9e90e0764d0ab7d30/Mrs\\_B\\_Mhindurwa\\_v\\_Lovingangels\\_Care\\_Limited\\_-\\_3311636-2020\\_-\\_Judgment.pdf](https://assets.publishing.service.gov.uk/media/60f025b9e90e0764d0ab7d30/Mrs_B_Mhindurwa_v_Lovingangels_Care_Limited_-_3311636-2020_-_Judgment.pdf)

[6] [https://assets.publishing.service.gov.uk/media/60a660fa8fa8f520c5e4403c/Miss\\_A\\_Prosser\\_v\\_Community\\_Gateway\\_Association\\_2413672\\_2020.pdf](https://assets.publishing.service.gov.uk/media/60a660fa8fa8f520c5e4403c/Miss_A_Prosser_v_Community_Gateway_Association_2413672_2020.pdf)

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