consultation response

employment relations

Codes of Practice

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1. Introduction

By letter published on 10 September 2004, the Employment Forum invited comments on a consultation paper dealing with proposed codes of practice for dealing with a number of matters relating to employment law. The issues in question are as follows:

- Resolving Disputes
- Trade Union Recognition
- Industrial Action Ballots
- Restrictions on the Right to Strike

Provision for codes of practice is made in article 19 of the proposed Employment Relations (Jersey) Law. This provides the Employment and Social Security Committee may issue codes of practice (after due consultation) for 'the purpose of promoting the improvement of employment relations'.

In this submission it is proposed to deal with a number of issues relating to each of these four issues on which comments are invited. But before dealing with these matters it is necessary to say something first about the process of legislating by code of practice. Before Article 20 of the proposed Law provides that a failure on the part of any person to observe any provision of a code of practice 'shall not of itself render the person liable to any proceedings'. But it also provides that a code of practice shall be admissible in evidence in any legal proceedings. After commenting on the process of legislation by code of practice, it is proposed to address some of the international labour standards and international human rights treaties that have a bearing on the matters under review. These different standards and treaties are very important in the sense that they give rise to binding obligations in international law which should be followed by those countries which have accepted or ratified the obligations in question. Following this consideration of international obligations, it is proposed to address the issues for consultation in relation to each of the three proposed codes of practice. These are respectively:

- Code 1: Recognition of Trade Unions
- Code 2: Resolving Disputes
- Code 3: Conduct of Ballots and Reasonable Limitations on Industrial Actiom

2. Legislation by Code of Practice

There are some concerns about the process of legislating by code of practice. These are concerns of democratic legitimacy and legal uncertainty. It is true that codes of practice are used in the United Kingdom for dealing with a number of employment matters (disclosure of information for the purposes of collective bargaining, time off for trade union duties and activities, industrial action ballots, picketing, and trade union access during recognition campaigns). It is also true that these codes of practice may be taken into account by courts and tribunals, and that they are sometimes very influential in resolving legal disputes that come before the courts: Thomas v NUM (South Wales Area) [1985] ICR 886.

There is, however, a qualitative difference between the British arrangements and those anticipated in the proposed Law. In the first place, codes of practice in the United Kingdom must be approved by Parliament: there is no

corresponding provision in the proposed Law. Secondly and more importantly, the British Codes of Practice are designed to flesh out and give guidance to legislation the main provisions of which have been settled by Parliament and have been passed in the normal way. In other words, the primary rules are to be found in the primary legislation. The proposed Jersey codes are very different in the sense that the primary rules are to be found in the codes of practice themselves.

The use of codes of practice in the way anticipated by the proposed Law diminishes the importance and status of the rules which they contain. So although a British trade union can enforce its right to recognition in the courts, its equivalent in Jersey would not be able to do the same, even though there may be similar rules in a code of practice. This is because legislation passed by Parliament (or the States) can be enforced in the courts, whereas a code of practice may not be. Indeed the courts are required only to take into account a code of practice: they are not bound to enforce it and may allow it to be displaced by other considerations.

There is thus a real concern that this is not a sufficiently robust basis for dealing with a number of the issues which it is proposed the codes of practice will cover. This is particularly true in relation to trade union recognition on the one hand and the right to strike on the other, both of which should be placed on a more secure legal base. The need for a system of greater legal certainty is enhanced by the terms of the Background Report to the Consultation on the Draft Employment Relations Law and Codes of Practice where a number of important undertakings are made in the Conclusions. Thus:

Any new framework of legislation . . . should consider individual and collective bargaining rights as well as meeting international requirements, such as ILO Conventions, and Human Rights legislation.

In addition the Background Report includes a number of overriding objectives of the proposed new legislation. These include complying with 'fundamental human rights and international law. These are bold – as well as important – undertakings. But it is not clear how they are met by proposed strategy of legislation by code of practice. If the commitment to international human rights is to be met, people's rights must be enforceable in the courts: it is not enough that the judicial or quasi – judicial body can refuse to apply them for reasons which are not specified in the legislation. International human rights law thus imposes duties on governments not only in relation to the content of the legal rules, but also on the manner of their implementation.

3. International Labour Standards

The Consultation Document reveals a desire to be bound by ILO Conventions as well as by other fundamental human rights law. This is very important and has a number of implications for the matters under consideration. It is proposed here to outline some of the main ILO Conventions and some of the main fundamental human rights treaties to provide a sense of just what this entails.

So far as the **ILO** is concerned, there are a number of Conventions that would have a bearing on the matters which are the current subjects of consultation. These include the following:

Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention 87)

Article 2
Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3
Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Right to Organise and Collective Bargaining Convention, 1949 (Convention 98)

Article 1
1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated
to -
(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2
1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3
Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4
Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or

employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Workers' Representatives Convention, 1971 (Convention 135)

Article 1
Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

Article 2
1. Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.

2. In this connection account shall be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.

3. The granting of such facilities shall not impair the efficient operation of the undertaking concerned.

Article 3
For the purpose of this Convention the term *workers' representatives* means persons who are recognised as such under national law or practice, whether they are--

(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or
(b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

Article 4
National laws or regulations, collective agreements, arbitration awards or court decisions may determine the type or types of workers' representatives which shall be entitled to the protection and facilities provided for in this Convention.

Article 5
Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives.

Other relevant ILO Conventions include the Labour Relations (Public Service) Convention, 1978 (Convention 151). Also relevant are the following

Recommendations: the Workers' Representatives Recommendation, 1971 (Recommendation 143) and the Labour Relations (Public Service) Recommendation, 1978 (Recommendation 159). These are available on the ILO website: www.ilo.org.

So far as **other international human rights treaties** are concerned, so far as relevant these include:

International Covenant on Civil and Political Rights 1966

Article 22
1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

International Covenant on Economic, Social and Cultural Rights 1966

Article 8
1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

European Convention on Human Rights 1950

Article 11
1.Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2.No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

European Social Charter 1961

Article 5 – The right to organise
With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

Article 6 – The right to bargain collectively
With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:
4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

4. Code 1: Trade Union Recognition

The first proposed code deals with trade union recognition and invites comments on a range of matters relating to a proposed recognition procedure which bears a striking resemblance to the statutory procedure introduced by the Employment Relations Act 1999, and recently amended by the Employment Relations Act 2004. The matters on which comments are sought specifically are:

- **The Subject Matter of the Agreement**: the consultation paper covers a wide range of matters. But there are other issues that should be included. These relate to the following:

    - The disclosure of information to trade union representatives for the purposes of collective bargaining
    - The legal status of the collective agreement, which should presumed not to be legally binding in line with the position elsewhere in the United Kingdom
    - The issues about which collective bargaining should take place (which should be wide and expansive)
    - The circumstances in which the employer should consult with trade union representatives

    So far as the last of these additional matters is concerned, consultation obligations should at least be consistent with the minimum obligations under European Law. These apply to

        - health and safety
        - the transfer of undertakings
        - collective redundancies
        - proposed changes affecting contractual conditions.

- **The Bargaining Unit**: The main consideration here which is not addressed in the consultation document is the wishes of the employees who are seeking to be represented by a trade union:

    - It should be a question for consideration whether the bargaining unit suggested by the union is appropriate.
    - Following the approach of the Court of Appeal in England, this does not mean a search for the bargaining unit that is the 'optimum or best possible': R (Kwik-Fit (GB) Ltd) v CAC [2002] IRLR 395.

- **The Level of Support**: The position here should reflect the legislation in Great Britain in this sense:

    - A union should be entitled to be recognised if it can demonstrate that 50% plus 1 of the employees in the bargaining unit are members of the union; or if it can show in a ballot that 50 % plus 1 of the employees in a ballot are in favour of recognition
    - In line with the position in Great Britain, a union should be entitled to call for a ballot where 10% of the bargaining unit are in membership and there is other evidence indicating that a majority would be likely to support recognition in a ballot. A simple majority of those voting should be enough.

- Where a ballot is held, more detailed provision should be made in the procedure for the trade union to have access to the workforce in order to enable it to explain the reason for seeking recognition and asking for the employees' support. The union should have the same access as the employer.
- Where a ballot is held, steps need to be taken to ensure that employers do not engage in unfair practices to discourage employees from supporting the union. Such practices include inducements, threats, intimidation, and the discipline or dismissal of activists.

- **The Process for Seeking Recognition**: There are a number of omissions here, including the following:

  - If a ballot is to be held, who is to supervise the conduct of the ballot? Who will supervise the trade union access arrangements?
  - What happens if there is a dispute about the access arrangements? What happens if the employer refuses to enter into an access agreement?
  - Is the ballot to be conducted by post or at the workplace? If the former who pays? If the latter is it to be before, during or after working hours?
  - If the employer fails to respond to the union request it is proposed that it should approach the JACS. But what is to stop the union from doing that now?
  - What happens if the JACS is unable to broker an agreement between the parties? Can the matter be referred to the Employment Tribunal as a collective dispute under article 19 of the proposed Employment Law?
  - If so, will the ET have the authority to order a ballot? Will it have the authority to supervise a ballot? Will it have the authority to order recognition without a ballot?
  - Will the Tribunal have authority to impose a bargaining procedure on the employer where the employer continues to refuse to negotiate with the union?
  - Will the Tribunal have authority to impose a legally binding bargaining procedure on the employer where the employer refuses to bargain with the union?

- **Other Matters**: there are a number of other matters that need also to be addressed. These are as follows:

  - **Exemption for Small Businesses**: There is no justification for restricting the operation of recognition procedures to businesses employing more than 10 employees. As is acknowledged, this will have the effect of exempting most employers from this obligation, and denying a substantial number of workers of the right to be represented by a trade union, even where they want such recognition. It is also inconsistent with article 4 of ILO Convention 98 above, which imposes an obligation to 'encourage and promote the full development and utilisation of machinery for [collective bargaining]'. There is no proviso that says 'except in companies that employ less than 11 employees. Apart from Great Britain (where there is a 20 employee threshold), there is no major country in the world which has

such a restriction: see K D Ewing and A Hock, The Next Step: Trade Union Recognition in Small Enterprises (2003). Such a restriction is in any event bizarre and irrational. It means that 10 union members in a company with 10 employees cannot secure recognition whereas 6 union members in a company with 11 employees can.

- **Minority Support**: A related problem to the foregoing concerns the situation where there are union members or supporters in a workplace which employs more than the threshold number required under the scheme (10 proposed for Jersey), but where these members or supporters constitute only a minority of the staff employed. ILO Convention 98 above, which imposes an obligation to 'encourage and promote the full development and utilisation of machinery for [collective bargaining]'. But it does not add – 'only where a majority of workers are in favour'. On the contrary, where a union does not have majority membership, it should 'nevertheless be able to conclude a collective agreement on behalf of their own members'. Under current British law, although their union is not recognised, union members nevertheless have a statutory right to be be represented by their trade union in individual grievance or disciplinary disputes. It is also the case that this right applies to employees of small businesses which are exempt from the statutory recognition procedure. There does not appear to be any similar procedure proposed for Jersey to protect employees in companies where – for whatever reason – a trade union is not recognised. This is a major omission which ought to be addressed.

- **Employer Inducements**: An issue which relates to recognition and de-recognition is the use of financial inducements by employers to encourage people to give up trade union representation rights. This is a practice which has been condemned by the European Court of Human Rights in Wilson and Palmer v United Kingdom [2002] IRLR 128 where it was said that

  47. In the present case, it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests. However, as the House of Lords' judgment made clear, domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union.

48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association (see paragraphs 32-33 and 37 above). It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants.

British law has since been changed to make it unlawful for an employer to make a financial inducement to workers to give up trade union representation where their union is recognised or seeking to become recognised: Employment Relations Act 2004, s 29. A similar initiative may need to be taken in Jersey to comply with international human rights obligations.

- **Time Off for Trade Union Members and Officials**

  It is proposed that provision should be made in collective agreements for facilities for trade union representatives. In Great Britain, legislation makes clear that an employer must allow time off work to trade union members and trade union officials in defined circumstances where the union is recognised. This is very different from what is being proposed in Jersey. Under the British system, on recognition the union members and officials are entitled automatically to certain defined minimum rights. Under the Jersey proposals in contrast, recognition will only entitle the union to bargain about such matters, without a statutory minimum base as a starting point. It also means that the union will be entitled only to those facilities which the employer agrees to, rather than those which in the words of ILO Convention 135, above, ‘may be appropriate’ to enable the officials ‘to carry out their functions promptly and efficiently’.

5. Code 2: Resolving Disputes

The Consultation Paper draws attention to the Employment Relations legislation presented to the States in 2002. It is said that this legislation is designed to produce ‘a speedy and effective dispute management process, that encourages and facilitates the resolution of disputes’. This is laudable, as are the proposals for the voluntary conciliation and arbitration of disputes. As is recognised in the Consultation paper,

Experience has shown that parties cannot be forced to negotiate and if they go through the process only because they have to, the outcomes are less likely to be successful and a resolution is less likely to be accepted in good faith.

It is a matter of regret that the foregoing sentiments are not fully reflected in the Consultation Document as it relates to proposed Code 2.

- **The Legal Framework for Resolving Disputes**

  Before considering some of the problems with the proposed new procedure, it is necessary to deal first with aspects of the legal procedure in the Employment (Jersey) Law 2003 and the proposed Employment Relations (Jersey) Law.

  - Article 88(4) of the Employment (Jersey) Law 2003 provides that: 'Where proceedings in respect of an individual or a collective employment dispute, or proceedings for infringement of any of the rights conferred by the Law, have been brought before, or referred to, the Tribunal, the Tribunal may by its award require any person to take, or refrain from taking, any action specified in the award'.
  - The proposed Employment Relations (Jersey) Law will repeal the words 'or a collective' in article 88(4). But Article 18(3) of the proposed Employment Relations (Jersey) Law also provides that: 'Article 88 of the Employment (Jersey) Law 2003 shall apply in respect of a collective employment dispute that is referred to the Jersey Employment Tribunal under this Article'. It is not clear what is intended or what is meant.
  - It is proposed in Schedule 2 of the proposed Employment Relations (Jersey) Law that the Employment Tribunal should not have authority to award specific performance of a contract of employment or to award that a person or group of people should not break their contracts of employment. This presumably means that individuals cannot be ordered back to work.
  - Article 93(2) of the Employment (Jersey) Law 2003 provides: 'An order of the Tribunal to take any action or to refrain from taking any action, may be enforced on application to the court made on behalf of the Tribunal'. This will have important implications if the tribunal is empowered to make awards to stop strikes.

- **The Proposed Dispute Resolution Machinery**

  It is a matter of concern that there is a great deal of uncertainty about the procedure for collective disputes. This uncertainty is particularly acute in relation to the proposal that one party may be able to refer a dispute unilaterally to arbitration by the Employment Tribunal where (a) all other methods of dispute resolution have been exhausted and (b) the other party is being 'unreasonable'. The uncertainty is as follows:

  - What does it mean that a party is acting unreasonably? Does it mean that their demands are unreasonable or that their conduct during the dispute is unreasonable?
  - Who decides whether a party is acting unreasonably? Is it the other party, or is it the Employment Tribunal? If the latter will there be legal argument on this question of jurisdiction before the matter can proceed to resolution?
  - What powers do the Employment Tribunal have to resolve a dispute? What does the reference in article 18(3) of the proposed Employment Relations (Jersey) Law mean, particularly in light of the proposed amendment to article 88(4) of the Employment (Jersey) Law 2003?

- Can the Employment Tribunal make an award 'requiring any person to take, or refrain from taking, any action specified in the award'? If so, what are the implications of this for industrial action?
- It appears that the Employment Tribunal will not the power to order workers to perform their contracts. But will it have the power to order a trade union to withdraw its instruction to workers to strike?
- Will the Employment Tribunal have the authority to order a trade union to instruct its members to return to work? What happens if the union refuses to do so? Will the order be enforceable in the ordinary courts under article 93(2) of the Employment (Jersey) Law 2003?
- If the Employment Tribunal does have the powers suggested above, how are these procedures compatible with the right to strike as protected by ILO Convention 87? According to the ILO Committee of Experts:

  The Committee considers that where a system of compulsory arbitration through the labour authorities, if a dispute is not settloed by other means, forms part of the general procedure applicable to collective disputes, this can result in a considerable restriction of the right of workers' organisations to organise their activities and may even involve an absolute prohibition of strikes, contrary to the principles of freedom of association.

- **Legal Protection for the Right to Strike**

  It is important to emphasise that these procedures for dispute resolution take place in the context of a legal system that does not offer any specific protection for the right to strike. It is true that the Background Report on the Consultation on the Draft Employment Relations Law and Codes of Practice acknowledges that 'The fundamental principle . . . that people can, and do, withdraw their labour and have a common law right to association, so long as the association is for legal purpose (sic)'. But athough the proposed Employment Relations (Jersey) Law deals with the common law issues relating to trade union status, it fails to deal with the common law problems relating to trade union action. Indeed one effect of the proposed new legal status for trade unions will make trade unions more vulnerable to the risk of legal liability when organising industrial action. This is because it will be possible for the union to be sued in its own name for the acts of its members and officials and to be liable in damages for the said acts.

  - **The Right to Strike and International Law**: Although there is no express recognition of the right to strike in ILO Convention 87, above, it has been implied by the ILO Committee of Experts on the ground that 'The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests'. The right to strike is thus part and parcel of article 3, and has in fact spawned a detailed and elaborate jurisprudence to which reference is made below. In addition, several of the other human rights instruments referred to above make express reference to the right to strike: these include the ICESCR and the European Social Charter. So far as the former is concerned, the matter was considered by the UN Committee on Economic, Social and Cultural Rights in 1997. In its Report on the United Kingdom in 1997, the Committee addressed a number of issues. These included the following:

11. The Committee considers that failure to incorporate the right to strike into domestic law constitutes a breach of article 8 of the Covenant. The Committee considers that the common law approach recognizing only the freedom to strike, and the concept that strike action constitutes a fundamental breach of contract justifying dismissal, is not consistent with protection of the right to strike. The Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy before a tribunal for unfair dismissal. Employees participating in a lawful strike should not ipso facto be regarded as having committed a breach of an employment contract.

The Committee made the following suggestions and recommendations:

21. The Committee suggests that the State party take appropriate steps to introduce into legislation the International Covenant on Economic, Social and Cultural Rights, so that the rights covered by the Covenant may be fully implemented. . . . .

23. The Committee recommends that the right to strike be established in legislation and that strike action no longer entail the loss of employment, and expresses the view that the current notion of freedom to strike, which simply recognizes the illegality of being submitted to an involuntary servitude, is insufficient to satisfy the requirements of article 8 of the Covenant. . . .

- **The Right to Strike in Jersey**: It is clear that the law in Jersey does not meet these obligations. There are two problems. One is the potential liability of the trade union and its offcials for organising industrial action. Such action in Great Britain is tortious and is liable to be restrained by an injunction. A trade union may also be liable in damages to the employer. Consequently, there is a partial immunity from common law liability for acts done in contemplation or furtherance of a trade dispute. This immunity is to be found in the Trade Union and Labour Relations (Consolidation) Act 1992. There is no corresponding immunity in Jersey. Although there is no recent history of employer litigation against trade unions during industrial action, trade unions nevertheless remain vulnerable in the absence of proper legal protection when exercising a basic human right.

  The other issue which arises in relation to the right to strike in Jersey concerns the position of the individual employee. There is no protection of the individual against disciplinary action or dismissal by the employer. The law relating to unfair dismissal in Jersey makes no provision for the dismissal of strikers, who would have to bring a complaint under the general principles. There is no guarantee that a worker dismissed for taking part in a lawful strike would succeed, and even if he or she did, there is no provision for unfairly dismissed workers to be reinstated. This is a clear violation of ILO Convention 87 which requires (a) that workers engaged in a lawful strike should be protected from dismissal, and (b) that workers dismissed for taking part in a lawful strike should be entitled to be reinstated if the dismissal is unfair.

  These principles were established by the ILO Committee of Experts following its examination of the position in the United Kingdom. At the

time of the Committee's comments, British law provided that an employee dismissed for taking part in a strike or lock – out could not make a complaint for unfair dismissal: the employer thus had an immunity from unfair dismissal liability. This was subject to the proviso whereby the immunity would be lost if the employer selectively dismissed anyone who had taken part in the action. The employer thus had an immunity provided he or she dismissed everyone who was involved in the action at the time of the dismissal. According to the Committee:

The Committee considers that it is inconsistent with the right to strike as guaranteed by Articles 3, 8 and 10 of the Convention for an employer to be permitted to refuse to reinstate some or all of its employees at the conclusion of a strike, lock-out or other industrial action without those employees having the right to challenge the fairness of that dismissal before an independent court or tribunal. The Committee on Freedom of Association has adopted a similar approach (see Digest of Decisions and Principles of the Committee on Freedom of Association, 3rd edition, 1985, paragraphs 442, 444, 445, 555 and 572).

In this connection, the Committee notes that common law strikes and most other forms of industrial action constitute a repudiatory breach of the individual worker's contract of employment. This has the consequence that the employer may lawfully treat the employment relationship as at an end without more ado. This happens only infrequently in practice. But it can happen, and the Committee is aware that there have been a number of situations in recent years where employers have used the fact that their employees were on strike as an excuse for dispensing with the services of their entire workforce, and recruiting a new one.

The Committee also notes that a lock-out would also constitute a repudiatory breach of the contracts of employment of the workers concerned. However the common law does not provide a means whereby those workers could obtain reinstatement in their employment, no matter how arbitrary or unreasonable the employer's behaviour had been. Furthermore, it would be in only very exceptional circumstances that such workers could obtain other than nominal damages at common law.

It is clear, therefore, that the common law does not accord workers who have been dismissed in connection with a strike, lock-out or other form of industrial action the right to present a complaint against that dismissal to a court or other authority independent of the parties concerned. The same is true of statutory provision relating to unfair dismissal - subject to the limited measure of protection which is afforded to those who are subjected to "discriminatory dismissal" within the meaning of section 62 of the Employment Protection (Consolidation) Act 1978 (as amended by section 9 of the 1982 Act). The Committee considers that this latter provision does not provide adequate protection for the purposes of the Convention: (i) because it still permits an employer to dismiss an entire workforce, even where the employer has initiated a lock-out or has provoked a strike through entirely unreasonable behaviour; and (ii) because an employer can re-hire on a discriminatory basis so long as there is a gap of three months between the dismissal of the "victimised"

workers and the re-hiring. Consequently, the Committee asks the Government to introduce legislative protection against dismissal, and other forms of discriminatory treatment such as demotion or withdrawal of accrued rights, in connection with strikes and other industrial action so as to give effect to the principles set out above.

(ILO Committee of Experts, 1989)

In its previous comment, the Committee had drawn the Government's attention to paragraph 139 of its 1994 General Survey in which it noted that sanctions or redress measures were frequently inadequate when strikers were singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal) and that this raised a particularly serious issue in the case of dismissal if workers could only obtain damages and not their reinstatement. The Committee indicated that legislation should provide for genuine protection in this respect, otherwise the right to strike would be devoid of content.

(ILO Committee of Experts, 1999)

British law now provides that employees engaged in a lawful strike have the right not to be unfairly dismissed for the first eight weeks of the strike. It has recently been proposed by the Labour Party that this should be extended to 12 weeks. At the expiry of the 8 week period, a dismissal may still be unfair if the employer has failed to take reasonable steps to bring the dispute to an end. But although these measures are light years away from the situation in Jersey, even they may not adequately meet the standards set by the ILO. There is no limitation in the ILO jurisprudence to the effect that the protection against dismissal may be time limited, regardless of how long the dispute lasts. It is also the case that under British law an employee found to have been unfairly dismissed is still not entitled to be reinstated at the end of the dispute. Unlike in Jersey, however, the employment tribunal at least has the power to order reinstatement, even though the employer is not bound to give effect to such an order. It has already been found by the Council of Europe's Social Rights Committee that the new British law does not meet the requirements of article 6(4) of the European Social Charter. In the words of the Social Rights Committee:

Regarding the consequences of strike action for individual workers, the Committee observes that although Schedule 5 of the ERA has improved the situation, employment protection is lost if the industrial action lasts for more than 8 weeks. This arbitrary threshold does not afford adequate protection.

If the 'limited protection against dismissal' in British law is thought to be inadequate, how can it possibly be said that Jersey law complies with the Social Charter?

6. Code 3: Conduct of Ballots and Reasonable Limitations on Industrial Action

The proposed Code 3 deals with 'Reasonable Limitations on Industrial Action', and four matters are raised for consideration: whether pre-strike ballots should be mandatory, whether there should be special rules relating to essential

services, whether there should be limits on secondary action and how picketing should be regulated. It is important to stress that these matters are dealt with to some extent by a number of international human rights treaties. The starting point is ILO Convention 87, article 3 which has been held by the ILO supervisory bodies in a now extensive jurisprudence to apply to the right to strike. The jurisprudence is relevant to two of the matters raised by the Employment Forum – essential services and secondary action. This is dealt with at appropriate points below.

- **Strike Ballots**

  The starting point on strike ballots should be trade union autonomy. Trade unions should be free to determine their own rules and procedures for dealing with strike ballots. A strong case – based on a clearly identifiable mischief – has to be made in order to justify violating the principle of trade union autonomy. With this in mind, there are a number of questions which the proposals for mandatory strike ballots raise:

  - Why is it proposed to intervene in this way? Are there trade unions in Jersey that do not consult their members before taking strike action?
  - To which action will the proposal apply? Will it apply to all industrial action or only to strikes?
  - Will the proposal apply to all strikes, regardless of the nature and circumstances of the dispute?
  - Why should a strike ballot be mandatory in a defensive strike in response to bad or unlawful behaviour by an employer?
  - Will there be a corresponding obligation on employers before a lock out or other industrial action initiated by the employer?
  - What happens if the union fails to hold a ballot, or if there are complaints about the way in which the ballot was conducted? How will it be enforced?
  - How is the ballot to be conducted? Are strike ballots to be held at the workplace, by post, or a combination of both?
  - If strike ballots are to be conducted by post, who will bear the cost of the postage and administration of the ballot? As the State is imposing the burden, will the State bear the cost?
  - Is there to be independent scrutiny of the ballots? If so, by whom? And if so, who pays?

- **Strikes in Essential Services**

  So far as restrictions on strikes in essential services are concerned, it is unclear what is being proposed. If a service is defined as an essential service, is it to be open to the employer to apply to a court to have the action restrained, or for the employer to take the matter to the Employment Tribunal as a collective employment dispute under article 19 of the proposed Employment Relations (Jersey) Law? If so, this is a fundamental breach of principle – no one's fundamental rights should be denied where there are less intrusive means of dealing with the consequences of their exercise of their fundamental rights:

  There is no ban on strikes in emergency services in the United Kingdom: steps are taken by use of the military or the police to deal with such industrial action. Even in the case of the firefighters' dispute in 2003 – 2004

(which coincided with troop deployments to Iraq), it was not necessary to impose a ban:

- Problems of continuity of service in sensitive areas such as hospitals should be dealt with by negotiation and agreement with the trade unions involved in the dispute who will typically be prepared to provide emergency cover. Voluntarism is better than coercion.
- It cannot be presumed that all disputes in so called emergency services will lead to a disproportionate threat to the public welfare. This would be particularly true of the extravagant list of services proposed in the Consultation Document. Would a one day strike by refuse collectors seriously be an emergency?

If the effect of the Code of Practice will be thus to restrain industrial action in essential services, it should also be pointed out that under international law, States are not at liberty to 'suggest' 'essential services' in order 'to gain special protection at times of threatened industrial action'. Although a restriction on industrial action is permissible under ILO Convention 87, the ILO Committee of Experts has emphasised that

The principle regarding the prohibition of strikes in essential services might lose its meaning if a strike were declared illegal in one or more undertakings which were not performing an 'essential service' in the strict sense of the term, ie services whose interruption would endanger the life, personal safety or health of the whole or part of the population.

This passage would require a close examination of any list of essential services proposed in Jersey. It must be open to question whether the ports (with possible exceptions for life sustaining imports) and public transport are essential services falling within this definition, and questions will arise about the application of the definition to some of the other services on the list. The ILO Committee of Experts has also emphasised that

Where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate them for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services.

- **Limits on Secondary Action**

The third area where restraints are proposed is in relation to secondary action. This is a controversial issue in Great Britain where legal restrictions were imposed in 1980, giving way to a legal ban in 1990. Secondary action is still banned in Great Britain, though the ban is a clear breach of international legal obligations. The matter has been considered on several occasions by the ILO Committee of Experts since 1989, which has concluded that:

Taken together, these changes appear to make it virtually impossible for workers and unions lawfully to engage in any form of boycott activity, or "sympathetic" action against parties not directly involved in a given dispute. The Committee has never expressed any decided view on the use of boycotts as an exercise of the right to strike. However, it appears to the Committee that where a boycott relates directly to the social and economic

interests of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike. This is clearly consistent with the approach the Committee has adopted in relation to "sympathy strikes":It would appear that more frequent recourse is being had to this form of action (i.e. sympathy strikes) because of the structure or the concentration of industries or the distribution of work centres in different regions of the world. The Committee considers that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided the initial strike they are supporting is itself lawful. (General Survey, paragraph 217.)

(ILO Committee of Experts, 1989)

The Committee recalls that its previous comments concerned the absence of immunities in respect of civil liability when undertaking sympathy strikes. It pointed out in this respect that workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute.

The Committee notes that the Government reiterates its previous comments concerning secondary action and adds that permitting forms of secondary action would be a retrograde step and would risk taking the United Kingdom back to the adversarial days of the 1960s and 1970s when industrial action frequently involved employers and workers who had no direct connection with a dispute.

The Committee further notes the comments made by the Trades Union Congress (TUC) of 7 November 1996 that it is a common tactic of employers to avoid the adverse effects of disputes by transferring work to associated employers and that companies have restructured their businesses in order to make primary action secondary. The Government, while indicating that there is no official information collected to measure the extent of this phenomenon, considers that it is fully consistent with its legislation and the Convention for employers to mitigate the adverse financial consequences of a strike.

(ILO Committee of Experts, 1999)

The Committee must note that, beyond the effects that these provisions may have in respect of secondary action, it would appear that the absence of protection against civil liability may even have a negative effect on primary industrial action. In these circumstances, the Committee can only reiterate its position that workers should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful and requests the Government to indicate any developments in this regard.

(ILO Committee of Experts, 2001)

The Committee recalls that its previous comments concerned the absence of immunities in respect of civil liability when undertaking sympathy strikes. It notes the Government's indication that no changes have been made in this respect. The Committee once again recalls that workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute. This principle is of particular importance in the light of earlier comments made by

the Trades Union Congress (TUC) that employers commonly avoided the adverse effects of disputes by transferring work to associated employers and that companies have restructured their businesses in order to make primary action secondary. The Committee must reiterate that workers should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful, and requests the Government to reply as soon as possible to the issues raised by the TUC and by UNISON in this respect.

While taking due note of the information provided by the Government, the Committee must recall once again that workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute, and that they should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful. It requests the Government to continue to keep it informed of developments in this respect in its future reports.

(ILO Committee of Experts, 2003)

It should thus be clear that by proposing a ban on secondary action, Jersey would not be honouring its stated intention to meet ILO standards and to comply with other international human rights treaties. In this respect it is to be pointed out that restricting or banning secondary action may breach not only ILO Convention 87 but also the European Social Charter. As the European Social Rights Committee pointed out in its 15th cycle of supervision: under British law a trade dispute is 'limited to disputes between workers and their employer. Accordingly secondary action is not lawful, effectively preventing a union from taking action against the de facto employer if this is not the immediate employer'. This was said to be one of several reasons why British strike law did not comply with article 6(4) of the Social Charter. These concerns were repeated by the Social Rights Committee earlier this year in the 16th cycle of supervision.

- **Limits on Picketing**

The Consultation Paper raises a number of question about whether there should be limits imposed on picketing. This is a matter which is subject to regulation in Great Britain where workers are protected from various legal liabilities only if they picket outside their own place of work. An accompanying Code of Practice recommends that no more than 6 people should attend any one picket line.

It is important to note, however, that these restraints arguably violate the right to freedom of expression as protected by article 10(1) and freedom of assembly as protected by article 11(1) of the European Convention on Human Rights. Even before the Human Rights Act 1998 incorporated the ECHR into English law, the English courts were unwilling to restrain a picket by workers who stood outside a shop to persuade shoppers not to buy the products of the mushroom company by whom the pickets were employed and with whom they were in dispute. Apart from the fact that the pickets were not doing anything unlawful, the court suggested that any such restraint would violate the right of the pickets to freedom of expression: Middlebrook Mushrooms Ltd v TGWU [1993] ICR 612. See now Redmond – Bate v DPP (1999) 7 BHRC 375

It is difficult to justify an arbitrary restriction on the number and location of the pickets. The law should instead focus on their purpose and on their actions. Are the pickets present peacefully to demonstrate or peacefully to persuade? Or are they there to intimidate, obstruct, or commit an offence? In either case the numbers involved and the location are irrelevant. People should be free to assemble for lawful purposes in any public place, but should not be permitted to assemble for the purpose of committing an offence. So in a sense the Consultation Paper is focussing on the wrong questions. It should ask: for what purposes should pickets be free to assemble, and what conduct should they be permitted to undertake? But if there is a right to freedom of assembly, what right does the State have to determine where it will be exercised and against whom? If there is a right to freedom of assembly why should workers not be free to picket workplaces other than their own – for example a shop that sells the products of the employer in dispute?

7. Conclusion

The proposals for Jersey employment law thus give rise to a number of concerns. Partly this is because of the uncertainty of what is being proposed and the uncertainty about the powers of the Employment Tribunal in collective disputes. It is true that some of the background documents refer to the importance of voluntary procedures, there is also a menacing reference to 'control'. A particular concern is whether the Employment Tribunal will have coercive powers in collective disputes). The other cause for concern is that much of what is being proposed takes place in a legal vacuum in which workers and trade unions have no rights: there is no right to be represented by trade union; no right to trade union recognition; and no right to strike. It would be considered by many to be wholly unacceptable that there exists in modern Europe a jurisdiction that fails to acknowledge some of the basic building blocks of citizenship in a democratic society. The absence of such a legal basis for trade union activity is all the more regrettable for the fact that it so obviously contradicts the stated intention of meeting international requirements 'such as ILO Conventions and Human Rights legislation'. What is being proposed for Jersey falls some way short of both. It also fails to bring the law of Jersey into line with minimum EC standards, to say nothing of the standards in the member states. The last word should be left to the UN Committee on Economic, Social and Cultural Rights which in its 2002 report in relation to the United Kingdom concluded that

Affirming the principle of the interdependence and indivisibility of all human rights, and that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation (see paragraph 21 of its 1997 concluding observations) and strongly recommends that the State party re-examine the matter of incorporation of the International Covenant on Economic, Social and Cultural Rights in domestic law. The Committee points out that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order.

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