

STATES OF JERSEY



DRAFT EMPLOYMENT AND DISCRIMINATION TRIBUNAL (JERSEY) REGULATIONS 201-

Lodged au Greffe on 14th January 2014
by the Minister for Social Security

STATES GREFFE



Jersey

DRAFT EMPLOYMENT AND DISCRIMINATION TRIBUNAL (JERSEY) REGULATIONS 201-

REPORT

Summary

The Draft Employment and Discrimination Tribunal (Jersey) Regulations 201- (the 'Draft Tribunal Regulations') would replace the Employment Tribunal (Jersey) Regulations 2005 (the "2005 Tribunal Regulations") from 1st September 2014.

The Discrimination (Jersey) Law 2013 (the "Discrimination Law") was adopted by the States of Jersey on 14th May 2013, sanctioned by Order of Her Majesty in Council on 9th October 2013 and registered by the Royal Court on 18th October 2013. Subject to States approval, an Appointed Day Act will bring the Discrimination Law into force on 1st September 2014.

The Discrimination Law is an overarching law that provides a framework for protection against discrimination and it includes 'race' as the first protected characteristic. Full details of the history and development of the legislation were set out in the Projet for the Draft Discrimination (Jersey) Law 201- (P.6/2013¹).

The Discrimination Law will amend Article 81 of the Employment (Jersey) Law 2003 to give the Jersey Employment Tribunal (the "Tribunal") responsibility for hearing complaints brought under the Discrimination Law, as well as complaints brought under the Employment Law. It has been necessary therefore to review and amend the 2005 Tribunal Regulations to ensure that appropriate provision is made for that extended jurisdiction in relation to the appointment of Employment Tribunal members and in respect of the constitution of the Tribunal for a hearing.

Specific changes

Subject to States approval, the Draft Tribunal Regulations would replace the necessary provisions of the existing 2005 Tribunal Regulations and would introduce the following new provisions –

1. In addition to the current Tribunal members², a pool of between 2 and 8 discrimination lay members will be appointed who have knowledge or experience of, or interest in, equality and discrimination matters generally, or discrimination and specific protected characteristics.
2. Where a panel of 3 members is formed to hear an employment-related discrimination complaint, the Panel will consist of the Chairman or a Deputy

¹ www.statesassembly.gov.je/AssemblyPropositions/2013/P.006-2013.pdf

² One Chairman, 1 to 5 Deputy Chairman, 2 to 8 employer representative side members and 2 to 8 employee representative side members.

Chairman and 2 lay members; one employee representative side member and one employer representative side member, chosen by rotation. It is important that the employer/employee balance is retained in employment-related discrimination cases.

3. Where a Panel is formed to hear a non-employment-related discrimination complaint (e.g. housing, services or education), the Panel will consist of the Chairman or a Deputy Chairman and 2 members from the new pool of discrimination lay members, chosen by rotation. The employer/employee balance is not required in such a case.
4. Provisions are made for transition from the 2005 Tribunal Regulations to the Draft Tribunal Regulations, including for the continuation of a hearing, for recruitment that has been started but not completed, for the continuation of existing members' terms of office, and for the delivery of the annual report.
5. The members of the Tribunal are prescribed as States' appointees and holders of States' offices for the purposes of Part 4 of the Employment of States of Jersey Employees (Jersey) Law 2005. This gives the Jersey Appointments Commission the authority to be involved in the appointments process.
6. New and re-appointed Tribunal members will be required to take a standard oath before the Royal Court.

Impact on the Tribunal

Article 16 of the Interpretation (Jersey) Law 1954 (Exercise of statutory powers before commencement of enactment) provides the power to take such preparatory steps as are necessary in order for the Tribunal to be up and running from the commencement date. As a necessary preparatory step, the recruitment process for up to 8 discrimination lay members can begin as soon as the Draft Tribunal Regulations have been adopted by the States. It is intended that recruitment will begin in mid-2014 to allow time for an open recruitment process and training of new members. Both the new and existing members of the Tribunal will receive Discrimination Law training.

The necessary timescales involved in the parties making and responding to a Tribunal complaint means that it is unlikely that any race discrimination complaints will be heard by the Tribunal in 2014. Based on the experiences of the UK, the number of complaints each year is expected to be relatively low:

- For the year April 2012 to March 2013³, the UK Employment Tribunal received 4,828 race discrimination complaints out of a total of 356,979 complaints contained in Tribunal claims in that year⁴. The proportion of race discrimination complaints is therefore around 1.5% of the total number of complaints. The Jersey Employment Tribunal received 335 complaints contained in Tribunal claims in the year 2012, so proportionately we could expect around 5 race discrimination complaints each year.
- The number of race discrimination complaints to UK Employment Tribunals is equivalent to around 10% of the number of unfair dismissal complaints⁵. If that percentage is applied to the number of unfair dismissal complaints

³ www.gov.uk/government/publications/employment-tribunal-receipt-statistics-management-information-july-to-september-2013

⁴ A Tribunal claim may (and usually does) include a number of complaints under different jurisdictions (e.g. unfair dismissal with failure to give notice on termination of employment and unpaid wages).

⁵ 49,053 unfair dismissal complaints were made to UK Employment Tribunals in the year April 2012 to March 2013.

received by the Jersey Employment Tribunal – 151 in the year 2012 – the Tribunal could expect to receive around 15 race discrimination complaints each year.

It is anticipated that a race discrimination complaint may be submitted in conjunction with other complaints, such as unfair dismissal, potentially making those Tribunal hearings more complex and lengthy. However, it is anticipated that, as with complaints under the Employment Law, the majority will be resolved before they reach a hearing. According to its annual report for 2012, 80.7% of the 157 Employment Tribunal cases forwarded to JACS by the Tribunal were settled by JACS conciliation.

Financial and manpower implications

The following financial and manpower implications were included in the Proposition to the States (P.6/2013), lodged in January 2013. No additional financial or manpower implications have been identified since that date.

Advice, conciliation and enforcement – In 2015, costs are estimated to be £200,000, which includes the full year cost of enforcing the Law via the Tribunal (including Tribunal members' pay for additional hearings and the increased usage of the service generally), the advisory services provided by JACS and CAB, and the costs of continuing to develop and prepare legislation for further characteristics. In subsequent years, enforcement and advisory costs are expected to increase slightly as each new characteristic is introduced, up to a maximum cost of £300,000 once all of the Regulations are in place.

The above costs will be met from within resources approved in the Medium Term Financial Plan (MTFP) and carry-forward funds.

Manpower – It is anticipated that the Judicial Greffe (which is responsible for the administration costs of enforcing the Law via the Tribunal) will require one additional part-time administrative post, at a maximum of Grade 8, to deal with the additional Tribunal workload and hearings from 2015.

Explanatory Note

These Regulations are based on the Employment Tribunal (Jersey) Regulations 2005 (the “2005 Tribunal Regulations”) and replace them in their entirety to reflect the expanded functions of the Tribunal originally established by Article 81 of the Employment (Jersey) Law 2003 (the “Employment Law”).

Article 81 of the Employment Law is amended by paragraph 1(7) of Schedule 3 to the Discrimination (Jersey) Law 2013 (the “Discrimination Law”) so that the Tribunal will in addition to its functions under the Employment Law, have responsibility for hearing complaints brought under the Discrimination Law.

These Regulations therefore provide for the constitution of the Jersey Employment and Discrimination Tribunal, the terms of appointment of its members, their remuneration and the Tribunal’s composition in relation to hearings of the Tribunal. These Regulations also repeal the 2005 Tribunal Regulations and make saving and transitional provisions.

Regulation 1 defines terms or expressions used in the Regulations.

Regulation 2 provides that the Tribunal shall consist of a panel comprising the following members who may only serve as a member in one of the categories of membership as follows –

- (a) a Chairman, who must hold a legal qualification;
- (b) at least one but not more than 5 Deputy Chairmen, who must also be legally qualified;
- (c) at least 2 but not more than 8 persons with knowledge or experience of, or interest in trade unions or matters relating to employees generally;
- (d) at least 2 but not more than 8 persons with knowledge or experience of, or interest in employers’ associations or matters relating to employers generally; and
- (e) at least 2 but not more than 8 persons with knowledge or experience of or interest in equality and discrimination matters generally, or discrimination and protected characteristics (within the meaning of the Discrimination Law).

Regulation 3 provides for the members of the Tribunal to be States’ appointees and holders of States’ offices for the purposes of Part 4 of the Employment of States of Jersey Employees (Jersey) Law 2005. They would be appointed by the States on the recommendation of the Minister for Social Security after consultation with the Jersey Appointments Commission (the “JAC”) who would oversee the member recruitment process.

Regulation 4 requires members of the Tribunal on appointment or re-appointment, to take oath of office before the Royal Court. Under *Regulation 12*, a member appointed under the 2005 Tribunal Regulations is not required to take the oath except if he or she is re-appointed under these Regulations.

Regulation 5 provides that a member’s term of office shall be for a term, not exceeding 5 years, to be specified in his or her appointment. A member may on written request to the Minister seek an extension of the term, who after consultation with the JAC may grant a second term not exceeding 5 years. Nothing in *Regulation 5* prevents a re-appointment from taking place under the provisions of *Regulation 3*.

Regulation 6 allows a member to resign at any time. It also provides for the other circumstances in which he or she will cease to hold office.

Regulation 7 provides for the daily rate of remuneration of members and for reimbursement of their reasonable expenses. The Minister for Social Security may by Order change the rates of remuneration currently specified in these Regulations.

Regulation 8 provides that employment disputes involving individuals will be dealt with by the Chairman or a Deputy Chairman, sitting alone. However, under *Regulation 9*, the Chairman may direct that an individual dispute be heard before the Tribunal consisting of 3 members.

Regulation 9 provides that –

- in individual employment disputes when so directed by the Chairman under *Regulation 8(2)*;
- in employment disputes to which *Regulation 8* does not apply;
- in individual employment disputes which involve an act of discrimination prohibited under the *Discrimination Law*; and
- in a complaint referred under the *Discrimination Law*;

the Tribunal shall consist of 3 members. The Chairman, or a Deputy Chairman, is to preside and the members are to be chosen by the Chairman by reason of their knowledge and experience of or interest in employees, employers and discrimination matters respectively (as described in (c), (d) and (e) above) and in rotation, as far as practicable. Where a Deputy Chairman is presiding he or she should where practicable be chosen having regard to his or her specialist legal expertise that may be required for the case. This *Regulation* also sets out the procedure to be followed where a member of the panel can no longer continue to hear a case after it has started.

Regulation 10 enables a Deputy Chairman to exercise the Chairman's administrative powers if the latter cannot act.

Regulation 11 requires the Chairman to submit an annual report to the States on the activities of the Tribunal and the Minister to lay a copy of it before the States.

Regulation 12 repeals the 2005 Tribunal Regulations, but makes saving and transitional provisions to the effect that an Employment Tribunal constituted before those Regulations are repealed, will continue to have effect and operate under the 2005 Tribunal Regulations until the case it is hearing is concluded. Recruitment of any new members to the Employment Tribunal that occurs but has not been concluded before these Regulations come into force shall be treated as if the recruitment process had taken place under these Regulations. Existing members of the Employment Tribunal shall continue in office until their specified term of office expires, but they shall be remunerated in accordance with *Regulation 7* of these Regulations. Transitional provision is also made to deal with the delivery of the annual report concerning the activities of the Employment Tribunal.

Regulation 13 sets out the title of the Regulations. If adopted by the States, they would come into force on 1st September 2014 which subject to the States approval, is the date proposed for the coming into force of the *Discrimination (Jersey) Law 2013*.



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Arrangement

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Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES, in pursuance of Articles 82 and 104 of the Employment (Jersey) Law 2003¹, and Articles 15(3) and 16(1) of the Employment of States of Jersey Employees (Jersey) Law 2005², have made the following Regulations –

1 Interpretation

- (1) In these Regulations, unless the context indicates otherwise –
- “Chairman” means a member of the Tribunal described in Regulation 2(1)(a);
 - “Deputy Chairman” means a member of the Tribunal described in Regulation 2(1)(b);
 - “Discrimination Law” means the Discrimination (Jersey) Law 2013³;
 - “Jersey Appointments Commission” means the Commission established by Article 17 of the Employment of States of Jersey Employees (Jersey) Law 2005⁴;
 - “Lay Member” means a member of the Tribunal construed in accordance with Regulation 2(2);
 - “member” means the Chairman, a Deputy Chairman or a Lay Member of the Tribunal;
 - “Minister” means the Minister for Social Security;
 - “Tribunal” means the Jersey Employment and Discrimination Tribunal;
 - “2005 Tribunal Regulations” means the Employment Tribunal (Jersey) Regulations 2005⁵.

2 The Jersey Employment and Discrimination Tribunal

- (1) The Tribunal shall consist of the following members –

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- (a) a Chairman, being a person who holds a qualification in law and who is appointed to hold the office of Chairman of the Tribunal in accordance with Regulation 3;
 - (b) at least one and not more than 5 Deputy Chairmen, being persons who hold a qualification in law and who are appointed to hold the office of Deputy Chairman of the Tribunal in accordance with Regulation 3;
 - (c) at least 2 and not more than 8 other members, being persons with knowledge or experience of or interest in trade unions or matters relating to employees generally;
 - (d) at least 2 and not more than 8 other members, being persons with knowledge or experience of or interest in employers' associations or matters relating to employers generally; and
 - (e) at least 2 and not more than 8 other members, being persons with knowledge or experience of or interest in matters relating generally to equality and discrimination, or to discrimination and protected characteristics within the meaning of the Discrimination Law.
- (2) The members described in paragraph (1)(c) to (e) are appointed to hold the office of Lay Member of the Tribunal in accordance with Regulation 3.
 - (3) A person shall serve as a member in respect of not more than one of the categories listed in paragraph (1).

3 Appointment of members

- (1) The members of the Tribunal shall be appointed to hold the offices specified in paragraph (2), in accordance with this Regulation.
- (2) For the purposes of Part 4 of the Employment of States of Jersey Employees (Jersey) Law 2005⁶ (the "2005 Law") –
 - (a) the office of Chairman of the Tribunal shall be a senior States' office prescribed under Article 16(1) of the 2005 Law;
 - (b) the offices of –
 - (i) Deputy Chairman of the Tribunal, and
 - (ii) Lay Member of the Tribunalshall be offices prescribed under Article 15(3) of the 2005 Law; and
 - (c) the holders from time to time of the office of Chairman of the Tribunal, Deputy Chairman of the Tribunal or Lay Member of the Tribunal are prescribed to be States' appointees under Article 15(3) of the 2005 Law.
- (3) The recruitment of members with the qualification, knowledge or experience of, or interest in the matters specified in Regulation 2, shall be overseen by the Jersey Appointments Commission, and conducted in accordance with the guidelines produced by the Commission under Article 24 of the 2005 Law

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- (4) The members of the Tribunal shall be appointed by the States on the recommendation of the Minister after consultation with the Jersey Appointments Commission.

4 Oath of member

- (1) This Regulation applies to any member of the Tribunal appointed or re-appointed under Regulation 3 or 5.
- (2) Every member shall, before entering upon the discharge of his or her duties, take oath before the Royal Court that he or she will well and faithfully discharge the duties attached to the office of Chairman of the Tribunal, Deputy Chairman of the Tribunal or Lay Member of the Tribunal, as the case may be.

5 Term of office of members

- (1) A member's term of office shall be for such period, not exceeding 5 years, as the States specify when appointing the member.
- (2) The Minister may, upon the written request of a member and after consultation with the Jersey Appointments Commission, extend the member's initial term of office by re-appointing the member to the same office for a second term not exceeding 5 years.
- (3) Regulation 3 shall not apply in respect of such a re-appointment.
- (4) However, nothing in paragraph (2) or (3) shall prevent a re-appointment from being made in accordance with Regulation 3.
- (5) A member may continue in office after his or her term of office has expired, so long as the continuation is only for the purpose of completing any proceedings that the member began to hear before that expiry.

6 Termination of office

- (1) A member of the Tribunal shall cease to hold office on resigning, by giving notice in writing to the Minister.
- (2) The Chairman or a Deputy Chairman shall cease to hold office if he or she ceases to hold a qualification in law.
- (3) Any member of the Tribunal shall cease to hold office –
 - (a) on becoming bankrupt;
 - (b) on the appointment of a curator of the member's property and affairs under the Mental Health (Jersey) Law 1969⁷;
 - (c) on being received into guardianship under the Mental Health (Jersey) Law 1969;
 - (d) if –
 - (i) in the case of a member that is the Chairman, without the consent of the Minister, or

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- (ii) in the case of any other member, without the consent of the Chairman,
the member has, for a continuous period of more than 6 months, been absent from any meetings of the Tribunal and unavailable to perform his or her functions in relation to the Tribunal when it was constituted in accordance with Regulation 9;
 - (e) if he or she fails or refuses to take oath of office under Regulation 4;
 - (f) on being removed from office by the Royal Court on either of the following grounds proved to the satisfaction of that Court –
 - (i) that he or she has neglected his or her duties in relation to the Tribunal, or
 - (ii) misconduct.
 - (4) A member of the Tribunal shall not be removed from office for any other reason.
 - (5) This Regulation shall have effect despite anything in Regulation 5.

7 Remuneration of members

- (1) Subject to paragraph (3), a member of the Tribunal shall be paid remuneration at the following rate for each day or part of a day on which he or she sits –
 - (a) if the member is the Chairman, £736;
 - (b) in the case of a member who is a Deputy Chairman, £552;
 - (c) in the case of a Lay Member, £97.
- (2) The members of the Tribunal shall also be reimbursed such reasonable expenses as the Minister may determine.
- (3) The Minister may, from time to time, by Order determine that different rates of remuneration shall apply from those specified in paragraph (1).

8 Hearings before single Tribunal member

- (1) In proceedings before the Tribunal relating to an individual employment dispute one member, being the Chairman or a Deputy Chairman, shall constitute the Tribunal.
- (2) However, if the Chairman thinks it is desirable to do so, he or she may direct that in proceedings relating to a particular individual employment dispute the Tribunal shall be constituted in accordance with Regulation 9.

9 Hearings before 3 Tribunal members

- (1) This Regulation applies –
 - (a) to proceedings before the Tribunal in respect of which the Chairman has given a direction under Regulation 8(2);
 - (b) to proceedings before the Tribunal to which Regulation 8 does not apply;

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- (c) to proceedings before the Tribunal which concern both an individual employment dispute and an act of discrimination prohibited under the Discrimination Law;
 - (d) to proceedings before the Tribunal which relate to a complaint referred to it under the Discrimination Law.
- (2) Subject to paragraph (3), in any proceedings before the Tribunal –
- (a) to which paragraph (1)(a), (b) or (c) applies, the Tribunal shall be constituted with 3 members, namely –
 - (i) the Chairman or a Deputy Chairman, as the presiding member,
 - (ii) one member, being a member to whom Regulation 2(1)(c) refers, and
 - (iii) one member, being a member to whom Regulation 2(1)(d) refers;
 - (b) to which paragraph (1)(d) applies, the Tribunal shall be constituted with 3 members, namely –
 - (i) the Chairman or a Deputy Chairman, as the presiding member, and
 - (ii) 2 members, being members to whom Regulation 2(1)(e) refers.
- (3) The Chairman shall choose which members shall constitute the Tribunal under paragraph (2) and ensure in so far as is reasonably practicable –
- (a) that the members to whom Regulation 2(1)(b) refers are chosen having regard to the specialist legal expertise that may be required for the case, but are otherwise chosen in rotation; and
 - (b) that the members to whom Regulation 2(1)(c), (d) and (e) refers are also chosen in rotation.
- (4) In any proceedings to which this Regulation applies, the decision of the Tribunal shall be according to the opinion of the majority of its members.
- (5) Where the Tribunal has commenced hearing a matter and one of its members (other than the Chairman) –
- (a) becomes absent; or
 - (b) with the permission of the Chairman or a Deputy Chairman as the presiding member, withdraws because he or she is unable to continue to hear the matter,
- provided the Chairman or a Deputy Chairman as the presiding member, the complainant and the respondent agree, the Chairman shall choose a substitute member from within the category of members listed in Regulation 2 from which the absent or withdrawn member was originally chosen.
- (6) Where there is no agreement under paragraph (5) or another member becomes absent or withdraws, the Chairman shall constitute a fresh Tribunal in accordance with paragraph (2).

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- (7) For the purposes of paragraph (5), a member shall be taken to be unable to continue to hear the matter by reason of absence where that member's absence will cause undue delay to the determination of the matter.

10 Powers of Deputy Chairman if Chairman unable to act

If the Chairman is for any reason unable to exercise any power under Regulation 8(2), 9(3), (5), or (8), 11(1) or 12(3), the Judicial Greffier shall appoint a Deputy Chairman to exercise that power.

11 Annual report

- (1) The Chairman shall prepare an annual report on the activities of the Tribunal and submit it to the Minister within 4 months after the end of each financial year.
- (2) The Minister shall lay a copy of the annual report before the States at the first reasonable opportunity.

12 Repeal, saving and transitional provisions

- (1) The 2005 Tribunal Regulations are repealed.
- (2) Notwithstanding the repeal of the 2005 Tribunal Regulations –
- (a) any Tribunal constituted under those Regulations shall continue to be so constituted for the purpose of completing any proceedings that that Tribunal began to hear before the commencement of these Regulations and the 2005 Tribunal Regulations shall continue to apply for the purpose of those proceedings;
 - (b) any recruitment of members which is in the process of being conducted under Regulation 3(1) of the 2005 Tribunal Regulations, and which has not been concluded before the commencement of these Regulations, shall be treated as recruitment having effect under Regulation 3(3) of these Regulations.
 - (c) any member appointed under Regulation 3(2) of the 2005 Tribunal Regulations –
 - (i) shall continue to hold office until his or her term of office has expired or is otherwise terminated under those Regulations,
 - (ii) is not required to take oath of office under Regulation 4 of these Regulations, but shall be so required if he or she is re-appointed under Regulation 3 or 5,
 - (iii) shall be remunerated in accordance with Regulation 7 of these Regulations;
- (3) The Chairman shall prepare a final annual report on the activities of the Tribunal constituted under the 2005 Tribunal Regulations, and that report shall form part of the first annual report on the activities of the Tribunal constituted under these Regulations, prepared under Regulation 11.

13 Citation and commencement

These Regulations may be cited as the Employment and Discrimination Tribunal (Jersey) Regulations 201- and shall come into force on the commencement of the Discrimination (Jersey) Law 2013.

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- ¹ *chapter 05.255*
 - ² *chapter 16.325*
 - ³ *L.10/2013*
 - ⁴ *chapter 16.325*
 - ⁵ *chapter 05.255.70*
 - ⁶ *chapter 16.325*
 - ⁷ *chapter 20.650*