

Dear Sirs

I am writing in connection with the Scrutiny Panel call for evidence in relation to the Draft Employment (Amendment No. 11) (Jersey) Law 201-

In compiling this email, I have spoken with a number of clients of across a range of business size and sector. Whilst there is broad support in principle for enhancements to (so-called) family friendly rights, there have been a number of concerns expressed both by clients and lawyers in this firm regarding the proposals as currently drafted and the proposed timeframe for their adoption. It is apparent from the Employment Forum's Recommendation (<https://www.gov.je/SiteCollectionDocuments/Benefits and financial support/R Review of Family Friendly Employment Rights 20171218 AC.pdf>) that the overwhelming majority of their responses came from employees and their representatives. I am accordingly concerned that the consultation may have not taken into account the full range and scope of the concerns of employers and I would suggest that the Forum could perhaps have been more proactive in seeking their views.

The main points which we would raise (in addition to the main point regarding how representative an exercise the Forum's consultation was) are as follows:

1. The proposed changes are due to come into force on 1 September 2019. This is too short a time frame for the introduction of such a significant change – by the time they are passed, employers will already have agreed maternity and parental leave with employees for leave commencing on or after that date. Employers will also need a significant period of time to consider changes to policies and approaches. They are also likely to require time to consider how absences should be managed across their businesses.
2. Concern has also been expressed at the potential disruption caused by permitting parents to take their leave in up to leave in up to 4 blocks, of no less than 2 weeks each, over a 3 year period. There is no provision for employers to be able to defer "blocks" of leave to take account of the requirements of their business – and accordingly the proposals have the potential to be extremely disruptive; this is particularly the case for smaller employers. There is an associated concern that smaller employers may be simply put off engaging employees with young families and/or that they will be less willing to offer flexible working arrangements.
3. It is disappointing that greater consideration has not been given to replicating the shared parental leave model in the UK. Even though the take up of shared parental leave has been low, the model is arguably a better one and presents less of an overall burden for employers whilst providing a significant enhancement of rights for employees. The Employment Forum does not appear to have taken the interests of employers into account at all in making their recommendation in this regard:

"The Forum recommends that a shared leave system should not be introduced. The Forum is conscious that the law cannot cover every eventuality and family arrangement and so there may be scenarios where shared leave might have been the preferred option for some parents. However, the Forum considers that providing parity via a defined period of leave for each parent is likely to provide a more positive outcome for the majority of new parents in terms of flexibility and promoting gender balance."

4. Concern has also been expressed regarding the potential for male employees to bring discrimination claims should employers choose to enhance maternity pay for women but not for men. There have been a number of cases in the UK which have looked at this point. Whilst they have not reached a definitive position, they would appear to suggest that such an approach is not

directly discriminatory (see *Capita Customer Management Ltd v 1) Mr M Ali 2) Working Families (Intervenor)*: UKEAT/0161/17/BA) but it may be indirectly discriminatory (see *Hextall v 1) Chief Constable of Leicester Police 2) Working Families (Intervenor)* UKEAT/0139/17/DA).

However, the UK model is different from the proposed Jersey model – in the UK mothers are still entitled to up to 52 weeks' maternity leave, with 39 weeks' statutory pay. However, after the compulsory two weeks' (or four weeks', if she works in a factory) compulsory maternity leave immediately after the birth, she can choose to end her maternity leave and pay and if both parents qualify, enter into an equivalent period of shared parental leave with her partner. Accordingly, maternity leave and pay are distinct from shared parental leave and pay.

Under the Jersey model by contrast, there will be one type of leave (parental leave) and accordingly there is a significant risk that if employers elect to enhance maternity leave and pay for women, then failing to do so for men will be discriminatory. This may be in accordance with the policy aims of the States – but the position as regards enhancements should be made clear either way.

5. It is unclear from the proposed legislation as to whether parental leave is intended to be "portable" as a right should employees move between employers (as well they might over 3 years). If it is intended, then consideration should be given as to how such rights should be monitored and proven by employers and employees. We are aware that there are available models from other jurisdictions (particularly Australia). Either way, the position should be spelt out explicitly.

I am happy to discuss the above in greater detail.

Yours sincerely

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