

Carey Olsen Starting Point Employment Law Guide – September 2018

Service area / [Employment, Pensions and Incentives](#)

Location / [Jersey](#)

Date / [September 2018](#)

Carey Olsen Starting Point Guides are intended as a general introduction and guide to different aspects of Jersey law.

They are a summary of the most important issues that we come across. It is very much the edited highlights of those issues. If you would like legal advice in relation to any specific circumstances, please do contact us.

[Introduction to Jersey](#)

Jersey is the largest of the Channel Islands and is a British Crown dependency. It has its own financial, legal and judicial systems. It is not part of the UK or of the European Union (although it has close relationships with both).

[All change in September](#)

Whilst in the UK changes to employment legislation generally happen in April, major changes to Jersey employment law have in recent years occurred in September.

September 2018 is no exception and will arguably be the busiest September for Jersey HR professionals for some years. There is a raft of changes occurring. The main ones are as follows:

[1. Family friendly legislation](#)

During the course of 2017, Jersey's Employment Forum launched a consultation in relation to proposals for a significant extension to Jersey's employment law in relation to what are termed "family friendly employment rights".

The outcome of that consultation was a wide ranging proposal to restructure Jersey's employment law in this area – in particular, the end of qualifying periods for statutory maternity leave and pay.

The States considered the changes and the current intention is to adopt the proposals in two stages – September 2018 and September 2019. The main changes for 1 September 2018 are set out below.

The main priorities for HR professionals should be:

- Checking policies and procedures in order to ensure that the changes are reflected in relation to:
 - a. **Flexible working** – An employee, can request changes to their contracted working hours for any reason (eg no requirement for a "caring" responsibility).
 - b. **Ante natal appointments** – Unlimited attendance at appointments – paid for mothers and up to 10 hours paid attendance by the father/partner.
 - c. **Maternity leave** – 26 weeks' leave for all women (no qualification period), of which 6 weeks are paid in full by the employer.
 - d. **Parental Leave** – 26 weeks' leave (no qualification period), of which 2 weeks are paid in full by the employer. The 26 weeks can be taken in 3 blocks of time.
 - e. **Adoption leave** – 26 weeks (no qualification period), of which 6 weeks are paid in full by the employer.

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- f. **Compulsory leave** – an employee on maternity or adoption leave may not be required to work during the first 6 weeks following childbirth (for those on parental leave, the relevant period is two weeks) but may be permitted to if they so choose (subject to any health & safety considerations). This replaces the previous provisions for compulsory maternity leave in the first two weeks following childbirth, which stated that a woman could not be permitted to work. There were previously no corresponding provisions for adoption or parental leave.
- Ensure managers are aware of the changes.
- In relation to employers who provide enhanced maternity pay (over and above the statutory minimum), consider whether equivalent enhancements should also be offered to those on parental leave.

2. Retirement – age discrimination & unfair dismissal

Age discrimination became a protected characteristic under the Discrimination (Jersey) Law 2013 on 1 September 2016. The Discrimination (Age) (Jersey) Regulations 2016 contained a transitional period in respect of retirement age, which permitted employers to retain a default retirement age – provided that the retirement was at or above the age set under the Social Security (Jersey) Law 1974 known as “pensionable age”.

Similarly, an employer could take into account the fact that a job applicant is nearing retirement age in relation to decisions regarding recruitment, promotion, job changes and training. In addition, employees have historically been precluded from bringing claims of unfair dismissal where they are over pensionable age or their employer’s default retirement age (provided it is higher than pensionable age).

The transitional period ends on 1 September 2018. One consequence of the transitional period ending is that any “forced” retirement after that date will run the risk of direct age discrimination complaints being brought together with unfair dismissal claims.

Direct age discrimination

However, employers will be able to retain a default retirement age without incurring liability in respect of age discrimination, if:

- The employer can demonstrate that the retirement age is objectively justified. Employers will need to consider this carefully – and should document their conclusions. Generally speaking, objective justification is difficult to achieve retrospectively, so employers wishing to rely on a default retirement age after 1 September 2018 should engage in such an exercise as soon as possible.

- In order to demonstrate that a default retirement age is objectively justified, an employer will need to be able to demonstrate that it meets a legitimate aim and that it is a proportionate means of achieving that legitimate aim.
- A legitimate aim might include:
 - economic factors such as business needs and efficiency (although cost alone is unlikely to be sufficient)
 - workforce planning (the need for business to recruit, retain and provide promotion opportunities and effectively manage succession) or
 - the health and safety of individual employees, their colleagues and the general public
- In order to demonstrate proportionality, employers must be able to show that:
 - the default retirement age will actually contribute to the legitimate aim which has been identified eg if the aim is to encourage loyalty or facilitate the recruitment and retention of employees then the employer should be able to produce appropriate evidence
 - the discriminatory effect of the default retirement age should be outweighed by the importance and benefits of the legitimate aim and
 - there should be no reasonable alternative to the action you are taking. If the legitimate aim can be achieved by less or non-discriminatory means then these must take precedence.

Unfair dismissal

In relation to unfair dismissal, retirement will from 1 September 2018 become a potentially fair reason for dismissal and the upper age limit for claims of unfair dismissal will be abolished. If a dismissal is discriminatory on the grounds of age, it will be automatically unfair. However, even if a retirement dismissal is not discriminatory, employers will still need to demonstrate that it is fair. As with any dismissal, to be fair for the purposes of the Employment (Jersey) Law 2003, an employer will need to demonstrate that the dismissal is genuinely by reason of retirement and that a fair process has been followed. A fair process is likely to require the following:

- **Giving employees “adequate notice” of impending retirement** – the relevant JACS guidance suggests that any procedure should be activated between 6 and 12 months ahead of retirement.
- **Giving due consideration to any request by the employee to stay beyond the fixed retirement age** – in practice, a formal procedure is likely to be advisable in order to give employees the opportunity to ask to continue if they wish, together with an appeal stage.

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In practice, retaining a default retirement age is likely to be the exception rather than the rule, given the challenges of objective justification.

More generally, businesses are likely to have to have far greater regard to performance management in relation to the management of employees.

However, performance management must be consistently applied – if older employees are targeted in any way, it may then give rise to claims for direct age discrimination. In relation to older workers with disabilities, employers should also have regard to disability discrimination (see below).

Employers should:

- Check the retirement provisions in contracts and handbooks
- Consider whether any default retirement age should be retained or abolished
- If a default retirement age is to be retained, consider and document:
 - a. The objective justification for the default retirement age
 - b. An appropriate retirement policy

JACS have published a Retirement Guide which is available [here](#)

3. Disability discrimination

When the Discrimination (Jersey) Law 2013 (the “DJL”) was lodged as a [proposition](#) with the States Assembly, the stated intention was to develop discrimination law over a number years by the use of regulations to extend the protected characteristics to which the law applies as follows:

- Race (covered in the DJL itself)
- Sex
- Age
- Disability

Sex discrimination was – quite properly split into a number of categories, so that the list of protected characteristics is currently:

- Race
- Sex (including discrimination on the basis of sex, sexual orientation, gender re-assignment, pregnancy and maternity) and
- Age (subject to transitional provisions until 1 September 2018)

With effect from 1 September 2018, the Discrimination (Disability) (Jersey) Regulations 2018 (the Disability Regulations) will also add disability as a protected characteristic.

Disability

A person is considered to have a disability if they have “one or more long-term physical, mental, intellectual or sensory impairments which can adversely affect a person’s ability to engage or participate in any activity in respect of which an act of discrimination is prohibited under [the DJL]”.

A “long term impairment” is one which:

- has lasted, (or is expected to last), for not less than 6 months or
- is expected to last until the end of the person’s life

An impairment which consists of a severe disfigurement is to be treated as having an adverse effect except where the disfigurement consists of:

- A tattoo or
- A piercing of the body for decorative or other non-medical purposes, including any object attached through the piercing for such purposes

Excluded conditions

The following tendencies are excluded from the definition of disability:

- a tendency to set fires
- a tendency to steal
- a tendency to physical or sexual abuse of other persons

This list of exclusions is considerably more narrow than the provisions of the equivalent legislation in the UK, which also excludes (in addition to tattoos and body piercings):

- Addiction (including a dependency) to alcohol, nicotine or any other substance (although this does not apply where the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment)
- Seasonal allergic rhinitis (usually known as hayfever)
- Exhibitionism
- Voyeurism

Types of discrimination

The Disability Regulations extend the definitions of direct discrimination and indirect discrimination as follows:

- Direct Discrimination – the Disability Regulations split direct discrimination into two:
 - a. Less favourable treatment of an individual because of a disability (either their own or someone else’s) – so this captures situations in which:
 - someone has a disability and is treated less favourably as a result
 - a person is treated less favourably because of

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someone else's disability (for example, if they have caring responsibility for a disabled person) – this is known as associative discrimination

- a person is perceived to have a certain disability
- b. Less favourable treatment because of something which arises in consequence of an individual's disability where an employer is aware or could reasonably be aware of the disability (unless the less favourable treatment can be objectively justified as being a proportionate means of achieving a legitimate aim) – the common example cited when the Disability Regulations were lodged being "if a restaurant refuses to seat a customer with a guide dog, that is unlikely to be direct discrimination. The refusal is because of the dog rather than because of the disability itself. However, the fact that the customer is accompanied by a dog is a fact which only arises because of his or her disability, and so this should amount to direct discrimination, unless the unfavourable treatment is justified (a proportionate means of achieving a legitimate aim)".
- **Indirect discrimination** – this is split into four:
 - a. A person (A) **indirectly discriminates** against another person (B) if:
 - A applies (or would apply) a provision, criterion or practice (PCP)
 - That puts or would put those of the B's protected group at a particular disadvantage compared to other groups
 - Unless A can show that PCP is a proportionate means of achieving a legitimate aim
 - b. Where A knows that B has a disability and is likely to be substantially disadvantaged, indirect discrimination also occurs where there is a **failure to make reasonable adjustments** in the following circumstances:
 - Where A applies an **provision, criterion or practice** (PCP) which puts a B at a substantial disadvantage compared with those who are not disabled and A fails to take reasonable steps to avoid the substantial disadvantage
 - If, but for the provision of an **auxiliary aid**, a disabled person would be put at a substantial disadvantage with those who are not disabled, A discriminates if they fail to take reasonable steps to provide the auxiliary aid
 - If a **physical feature** of premises puts a disabled person at a substantial disadvantage with those who are not disabled, A discriminates if they fail to take reasonable steps to avoid the substantial

disadvantage where:

- A physical feature of premises includes:
 - a feature arising from the design or construction of a building
 - a feature of an approach to, exit from or access to a building
 - a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises
 - any other physical element or quality
- Avoiding the substantial disadvantage may include:
 - removing the physical feature in question
 - altering it or
 - providing a reasonable means of avoiding it
- With respect to the obligation to make reasonable adjustments to premises, the enacting legislation has been delayed to give employers time to make any necessary changes. As a result, the changes will not come into force until 1 September 2020.

Employers should consider the following:

- reviewing policy, practice and procedure in relation to:
 - a. recruitment and selection
 - b. determining pay, terms and conditions
 - c. sickness absence
 - e. drug and alcohol issues (this is particularly critical in a Jersey context given that addiction is not excluded as a disability)
 - f. training and development
 - g. promotion
 - h. dismissal
 - i. redundancy
- undertaking a remediation exercise to ensure that where a workplace feature or practice puts an employee with a disability at a disadvantage, consideration is given to what 'reasonable adjustments' can be made
- considering what adjustments may be required to premises when the transitional period ends on 1 September 2020

JACS have produced a [guidance document](#) with the Citizens Advice Jersey in relation to practical measures relating to disability discrimination.

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Key contacts

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