OBJECTS AND REASONS

The Labour (Relations) Bill 2018 seeks to provide for the classification of employees, the terms and conditions of employment, employee performance and disciplinary matters, dispute settlement mechanisms, work permits and related matters.

Part 1 - Preliminary

The part defines key terms and confirms the Bill's applicability to all employees except police officers, employees in the Anguilla Public Service and persons with diplomatic immunities. It also makes it clear that the provisions in the Act are minimum standards and that employers can confer more favourable terms and conditions on their employees.

Part 2 – Classification of Employees

This part codifies the common law principles of good faith that is implied in the contract of employment and sets the tone by which employers and employees engage with each other.

Employees are now classed into 4 categories of employment: permanent employees, fixed term employees, seasonal employees and casual employees.

1. Permanent employees are considered to be the normal standard of employment for employees who are belongers of Anguilla and therefore this standard impacts the other categories of employment. Permanent employees may be grouped into full-time and part-time employees and the main distinguishing feature between them is the number of hours worked.

2. An employee may be employed using a fixed term contract which must be in writing and must state when or how the employment will end and the reasons for ending the employment in that way. An employer must have a genuine reason for ending the contract of employment and must treat this category of employees no less favourably than a comparable permanent employee.

For managers or executive officers whose employment includes successive fixed term contracts then—

(a) for those who have entered into 2 fixed term contracts, from the date of the end of the second contract the employee shall be a permanent employee; or

(b) where the cumulative period of employment in the same business is 3 years, from the beginning of the 4th year the employee shall be a permanent employee; whichever occurs first.

For all other employees who have been working in the same business for one year then from the beginning of the 2nd year that person shall be a permanent employee.

3. Where a seasonal employee has worked in the same business for one high season then from the beginning of the next high season that employee shall be considered to be a permanent

employee. A seasonal employee shall not be treated any less favourably than a comparable permanent employee.

These provisions apply to a belonger of Anguilla or the spouse of a belonger of Anguilla.

4. Finally, casual employment refers to an informal working arrangement where there is no regular or clear pattern of work and the employer is not obligated to provide work and the employee is not obligated to perform work and usually occurs when it is difficult to predict when the work needs to be done and when the work needs to be done quickly.

Part 3 – Terms and Conditions of Employment

General Terms and Conditions

This Part provides for a standard 8 hour work day and 44 hour work week with a minimum of 1 day's rest in every 7 day period. Additionally, meals intervals of not less than 1 hour are to be provided after 5 hours of continuous work. There are overtime provisions of one and half times the normal wage on regular days and double pay on public holidays. This does not apply to managerial employees or executive officers. They are entitled to compensatory time off. Further, employees who have reported to work but who have been stopped or prevented from working by the employer or act of God, must be paid. Additionally, employees on stand-by at the work place or on call must be paid accordingly. Employees paid by the hour or the day must be paid for public holidays even though they have not worked, so long as they did work on their scheduled work day before and after the holiday.

Probation

Probation is increasingly becoming a part of the term of an employment contract and therefore the Ministry attempted to clarify and modernize the legal position pertaining to this. Probation is not a mandatory employment term so that employers and employees do not have to agree to commence employment using a period of probation. However, where the parties have agreed to enter into a period of probation note that the objectives of this is for an employer and employee to assess suitability for the job in that—

(a) an employer must objectively assess whether the new employee is suitable for the job taking into account the required standard of performance matched against the employee's capability, skills, performance, attendance and general conduct; and

(b) an employee must objectively assess whether they have the skills necessary to perform the job in the particular work environment.

The probationary period—

(a) for managers and executive staff must not exceed 6 months; and

(b) for all other staff must not exceed 3 months.

Guidance is provided as to what is expected by the employers during probation. Where during probation an employer determines not to continue the contract of employment with an employee then that employee has the right to request written reasons explaining why the employer took this decision.

Rights and Remedies

The purpose of this division is to highlight the seriousness of the Ministry when it comes to upholding the classification of employees and for establishing that the normal category of employment is employment on a permanent basis. Therefore, where an employee is of the view that an employer has attempted to defeat any of the provisions of Part 2 that employee may bring a claim to the Tribunal which can declare the rights of the employer and the employee and make an appropriate award including compensation and exemplary damages.

Accrued benefits (Transitional Measures)

This part seeks to determine, preserve and distribute any benefits that an employee would have been entitled to in accordance with the policies of any business when that employee retired or the contractual term ended. To this end, the Minister may attempt in the first instance to resolve the matter through negotiation or the Minister may instruct the Attorney General to Act as the de facto Pensionable Commissioner whose purpose would be to protect the benefits of such employees.

This part is transitional because it applies to benefits that would have accrued before this Act was passed.

Leave

This division outlines the leave entitlement of employees. Periods of absence from work due to maternity, illness or injury cannot be deducted when considering length of service. Where an employee has been terminated, they are entitled to be paid for any holidays that they have not yet taken. Employees are also entitled to paid sick leave, maternity leave for up to 14 weeks, paternity leave for up to 1 month in any given year, leave to fulfil parental responsibilities and leave of up to 1 month after adoption of a child 3 years old or less. Additionally employees are also entitled to full pay while doing jury service, and half pay when representing Anguilla at national level at any sport or cultural event approved by Executive Council. Note that effective 31st August 2019, employees will be entitled to annual paid holiday leave of 15 working days.

Distribution of Wages and Service Charge

This division seeks to ensure that employees receive remuneration for their work. As such, it provides that an employee's wages are to be paid in EC or US currency at regular intervals (ie. daily, weekly, fortnightly or monthly). An employer cannot impose on an employee any restriction on how or where they should spend their wages. While an employer can make lawful and authorized deductions from an employee's wages, the deductions should not exceed one third of the gross wage. An employer is prohibited from deducting from an employee's wage any fees associated with the recruitment of the employee including not more than 50% of work permit fees (subject to the direction of the Labour Commissioner), and visa fees. Where an employee has been terminated, he/she must be paid outstanding wages within one week of termination. While wages must be in cash, an employer can give the employee additional benefits in cash or in kind (eg. accommodation, health care, retirement, gratuity, shares, stock etc), but these must not be in the form of alcohol, cigarettes, weapons or controlled drugs.

Employees have the right to seek redress in court to recover wages. Amounts owed by employers to employees will be given priority over all other debt claims against an employer. No more than 50% of an employee's wages are entitled to attachment or seizure by the court.

The payment of service charge is provided for in this Part. It is to be pooled and distributed every 4 weeks. An employer with at least 5 employees is obligated to establish a service charge committee to oversee the distribution of service charge. Tips however are the sole property of the employee.

Establishment of Minimum Wage

Under this part Executive Council is empowered to fix a minimum wage for employees generally and to fix different minimum wages for different categories of employee. To assist in this process, Executive Council can appoint a minimum wage committee to consider and advise on an appropriate minimum wage. After a period of consultation, the wage is fixed by Order of the Executive Council and employers are obligated to comply.

Part 4 – Employee Performance

The effective performance of employees is vital towards the success of any business. This part encourages employers to establish systems, policies and practices that manage the performance of employees in a fair, transparent and effective manner. This assists employers in bringing structure and therefore clarity to the standards of the employer and the expected behavior of employees. All disciplinary measures taken by an employer against an employee will be measured against the manner in which the employer managed their business.

Part 5 – Disciplinary Measures

An employer may take disciplinary action in relation an employee for misconduct or unsatisfactory performance. This Part sets out the disciplinary options available to an employer as well as the procedure to be followed. It prohibits termination on grounds related to:

- the employee's race, colour, sex, religion, ethnic origin, nationality, social origin, political opinion or affiliation, trade union affiliation or activity, disability, sexual orientation, gender identity, HIV status, marital status or age;
- participation in industrial action
- any complaint made by the employee against the employer for violation of the Code.

The employee can terminate an employment relationship without notice if the employer has acted in a way that makes it unreasonable for the employment relationship to continue and claim against the employer for constructive dismissal. Similarly, an employer can dismiss an employee without notice in cases of gross misconduct.

In cases of misconduct or unsatisfactory performance, the employer can use various formal or informal measures to discipline the employee. Additionally, an employer can dismiss an employee who has been continuously ill for more than 6 months or who is injured, so long as it is determined that the employee no longer has the capacity to do the job. An employer can also discipline an employee for abuse of sick leave.

The same notice periods for termination have been maintained in this Bill.

Part 6 – Termination of the Contract of employment other than dismissal

Under this part, termination of employees for reasons of redundancy is permitted. However, the employer must consult with and inform the employee's trade union or representative and the Labour Commissioner. Criteria on selection of employees for redundancy are also outlined. An obligation is also placed on employers who rehire persons to carry out essentially the same functions within six months of redundancy to give an opportunity to the employees who were terminated. Where in making redundancy arrangements an employer invites employees to offer themselves for termination, severance pay exceeding that outlined in the Code must be offered.

Where an employee is terminated on grounds of redundancy, he/she will, from 31st August 2019, be entitled to severance pay as follows:

- one week's wage for each completed year of service up to the first 5 years;
- 2 weeks' wage for each completed year of service in excess of 5 years

  All calculated on the basis of the highest wage earned by the employee in the year before termination.

Part 7 – Rights and Remedies of Employees

This Part establishes that an employee should be treated fairly in any disciplinary action taken by the employer and that that employee has the right not to be unfairly dismissed. In this regard, an employer must provide an employee with a written statement explaining the reasons for any formal disciplinary action including the reasons for dismissal. Notwithstanding any internal disciplinary system utilized by the employer, the fairness of a disciplinary action is essentially a question of fact for the Commissioner and the Tribunal to resolve. The remedies that an employee may be entitled to if he or she was found to be unfairly dismissed are: re-engagement; reinstatement and compensation.

Part 8 – Continuity in Employment and Change of Ownership

In the event of winding up of the employer's business, any amounts owed to employees take precedence to the claims of other creditors including Government and Social Security. In circumstances where there is a change in the ownership of the business, an employee who continues in employment with the new owner will carry forward all the years of service and accrued rights. If the employee is not employed by the new owner/ employer, the old owner/ employer must pay the employee all wages and benefits due including severance pay.

Part 9 – Dispute Settlement Mechanisms

Introduction

This part comes into effect on 31st August 2019. The guiding principle of the ministry underpinning this part is to support successful employer-employee relationships through the timely and efficient settlement of disputes. Therefore, the overriding objective of this part is to establish a modern system which encourages and facilitates the settlement of disputes in a fair, timely and efficient manner. The dispute settlement system comprises of 2 parts that flow together, that is, alternative dispute resolution services and court procedures. Alternative dispute resolution services are encouraged to be utilised before proceeding to the more formalised court procedures.

Alternative Dispute Resolution Services

"Alternative dispute resolution services" mean conciliation, facilitative mediation and evaluative mediation. These services provide an alternative, in the first instance, to more formal court or litigation procedures. It facilitates the voluntary settlement of disputes between the parties by a neutral third party. Alternative dispute resolution services comprise of 3 stages.

The first stage is conciliation which means an informal process in which a conciliator acts as a neutral third party to assist in resolving specified employment disputes. All labour officers are considered to be conciliators and to some degree already perform this service.

If conciliation fails then parties may be directed to engage in mediation. Mediation means a semi-formal process in which a certified mediator acts as a neutral third party to facilitate communication between parties in an employment dispute with a view to assisting them in reaching a voluntary agreement. Certified mediators mean persons who have been trained as mediators under the auspices of the OECS Supreme Court.

The third stage in Alternative dispute resolution is evaluative mediation which is conducted by the Labour Commissioner. Evaluative mediation is a more formal process in which the Labour Commissioner takes an interventionist approach and seeks to settle an employment dispute based on her view of the strengths and weaknesses of a party's case and the possible legal outcome of a dispute. Under this process the Labour Commissioner may conduct an investigation in order to obtain information to assist in the settlement of the dispute. In order to conduct the investigation, the Labour Commissioner can direct the attendance of relevant persons to her office to assist in an investigation into any employment dispute.

During the investigation the Labour Commissioner may refer a point of law to the Labour Tribunal. This reduces the need for litigation and its associated time and costs. At the close of the investigation, the Labour Commissioner must produce a Statement of Findings which contains a summary of the dispute, the issues arising, an evaluation of the strengths and weaknesses of each party's case and any recommendations for resolving the dispute.

With the exception of evaluative mediation, all parties must consent to participate in the service. For evaluative mediation the Labour Commissioner can impose this process on the parties particularly where a party, without reasonable cause, refuses to participate in either conciliation or mediation. For each alternative dispute resolution service provided any agreement arising from the service must be entered into voluntarily and cannot be imposed on the parties.

Note that if the Labour Tribunal finds that the refusal by a party to participate in alternative dispute resolution was unreasonable then at the outcome of a hearing the Tribunal may impose a penalty.

The process of alternative dispute resolution is to be managed by the Labour Commissioner. When an application to settle a dispute is received by the Labour Department it is to be assessed and a determination made as to whether alternative dispute resolution is appropriate, and if it is, which one is appropriate or whether a matter should proceed directly to the Labour Tribunal. Guidance is provided to assist the Labour Commissioner in determining whether a matter should proceed directly to the Tribunal without the need for alternative dispute resolution service. Nevertheless, when a matter comes to the Tribunal, before proceeding to hear the matter the Tribunal must consider whether mediation has been done and may recommend that the parties enter into mediation.

Court Procedures

"Court procedures" are divided into 2 stages: first is the Labour Tribunal process and then the findings of the Tribunal may be appealed to the Supreme Court which is the second court process. The advantages of a Tribunal over an ordinary court process are the specialist knowledge that adjudicators bring to the practice and the informality of the procedure which allows for ordinary persons or specialists in the area such as union members to present their case. The tribunal while being guided by formal rules of evidence is not bound by it which allows the tribunal to take a more interventionist approach in settling disputes. This allows for matters to be presented in a more timely manner which is usually more cost effective for ordinary litigants.

The Labour Commissioner is responsible for coordinating labour disputes to the Labour Tribunal which comprises of a panel of 3 attorneys appointed by the Minister. The chair of the Tribunal

shall be appointed by the Minister acting after consultation with the judge of the Supreme Court. The other 2 members shall be appointed by the Minister acting after consultation with chair. In terms of achieving the goal of a timely settlement of disputes, the Tribunal has jurisdiction to provide the Labour Commissioner with written determinations on points of law without the need to engage in a hearing. The Tribunal can sit using one person or using a panel of all 3 persons depending on the nature of the issue to be adjudicated. The jurisdiction and sitting of the Tribunal in this manner is not a new concept. This part has been modelled from the UK's Employment Rights (Dispute Resolution) Act where, since 1998, these kinds of powers were made available to their employment Tribunal.

Except for contempt of court proceedings, the Tribunal does not have jurisdiction to hear criminal matters.

Where a party is dissatisfied with the procedure or judgement rendered by the Labour Tribunal then that person has recourse to the Supreme Court on appeal.

Part 10 – Work Permits

This Part maintains the work permit requirements for persons who are not belongers of Anguilla. The administration of this Part of the Code is governed by some underlying principles which include:

- The responsibility of the Minister of Labour for ensuring that belongers of Anguilla are engaged in gainful employment as a paramount consideration to all matters pertaining to work permits; and
- The recognition of the invaluable contribution to the development of Anguilla by persons who engage in employment on work permits which requires that the Ministry through a balancing act develops policies that attract and foster the talent of persons who are non-belongers.

The Minister of Labour is empowered to grant, renew, vary or extend work permits and consult Executive Council on revocations and refusals. There are 3 categories of work permits – general, temporary and self-employed. The Minister can make regulations restricting the issuing of work permits for certain sectors or trades where he/she is of the view that the skill set in no longer necessary, local business may be undermined or local talent should be developed. The Director of Economic Planning must also first consult with the Ministry before granting business licences.

There are several categories of persons exempt from work permit requirements. These include children born in Anguilla (who may not be belongers of Anguilla) and spouses of belongers.

In considering work permit applications, consideration will be given to several matters including whether there is a genuine need to engage the perspective employee and whether efforts were made via advertising to recruit a belonger, spouse of a belonger or a person legally resident in Anguilla. Minister can exempt an employer from the advertisement process where he/she is aware that the

skillset is not available or that it is unreasonable to do so based on the circumstances of the application.

A work permit issued for a professional, managerial or skilled occupation may be subject to conditions that (a) the employer develops and submits an employee training or understudy programme to the Ministry, or (b) establishes a scholarship programme or contributes to a scholarship fund, or (c) the permit will not be renewed beyond a specified period.

Work permit holders are not compelled to live with their employers; they are entitled to retain their travel documents and they have all the rights and benefits conferred by the Code.

Part 11 – Miscellaneous

Offences under the Code cannot be prosecuted after the expiration of a year from the date on which the Labour Commissioner is notified. The Minister of Labour is empowered to make regulations to give effect to the provisions of the Code. The Code also preserves the schedules to the Acts which are being repealed.