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# Doing Business In...

## Bermuda

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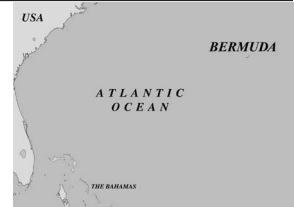
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# 2020

## Trends and Developments

### *Contributed by:*

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### **Introduction**

Bermuda had a very good 2019 – business was on the up, tourism figures were promising, and there was a general feeling of optimism in looking to 2020. We all know what happened next.

No one could have planned for what transpired, but the restrictions imposed out of necessity are now being slowly eased, and remote working has succeeded in keeping, at least, the international business sector ticking along (tourism has, as one would expect, fared less well), so we can once more put our heads above the parapet and examine what the future may hold.

Particularly in the tourism sector, COVID-19 restrictions have had an impact on employment for many in Bermuda, with redundancies and lay-offs an unfortunate, but somewhat inevitable, part of the response. Below we examine what options an employer may have under Bermuda law in this area.

Another impact of the COVID-19 restrictions has been the move to remote working, not just for offices, but also for the Bermuda courts, which have been keeping pace with the latest developments in holding virtual hearings whilst physical hearings have not been possible.

Away from the responses to the pandemic, we now have an economic substance environment fully laid out, with legislation, regulations and guidance notes clarifying the requirements to demonstrate compliance. Most clients seem keen to comply and retain their Bermudian status, with the potential for many to set up offices and add employees on island to justify substance. Tax and work permit breaks are also on offer to stimulate these moves.

On a positive note, there is a proposed change to the “60:40 rule” designed to encourage more foreign investment in Bermuda, with overseas control of local companies now to be enshrined in legislation and not subject to specific governmental approval.

### **Employment Implications in a COVID-19 Impacted Bermuda**

The Employment Act 2000 (the “Act”) provides that an employer may terminate an employee whose position is redundant. An

employee is redundant where the termination of the employee is, or is part of, a reduction in the employer’s work force as a direct result of any of the conditions of redundancy.

The conditions of redundancy are:

- (a) the modernisation, mechanisation or automation of all or part of the employer’s business;
- (b) discontinuance of all or part of the business;
- (c) sale of a business;
- (d) reorganisation of the business;
- (e) reduction necessitated by economic conditions; or
- (f) the impossibility or impracticability of carrying on the business at the usual rate or all due to an act of God or other circumstances beyond the control of the employer.

An employee may be made redundant due to COVID-19 restrictions based on conditions (e) and/or (f) cited above.

An employer will have to ensure that they have followed the consultation provisions contained in Section 30(2) of the Act including the consideration of any possible measures that could be taken to mitigate the adverse effects of any termination on the employees concerned.

On termination of employment on grounds of redundancy, an employee who has completed at least one year of continuous employment is entitled to be paid severance allowance. The amount of severance payable is no less than the equivalent of two weeks’ wages for each year up to the first ten years and three weeks’ wages for each year thereafter, but up to a maximum of 26 weeks’ wages in total.

Contractual notice (or in the absence thereof, statutory notice) will also have to be paid to the employee. Employers should ensure that they have also looked at any enhanced severance provisions in the contract of employment or staff handbook.

In a bid to stave off outright redundancy, businesses on occasion opt to rely on lay-offs as a stopgap measure, with the hope that they may be able to rationalise and eventually continue their operations. Pursuant to Section 32 of the Act, where any of the

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conditions of redundancy exist (as noted above), an employer may lay off an employee for a continuous period not exceeding four months, following which the lay-off will be deemed to be a termination for redundancy and severance will become payable (as summarised above).

Our view is that no notice is legally due to be given to an employee unless the contract of employment provides for such.

In a lay-off situation, the employer provides no work for its employees, even though they are available to undertake their duties. It effectively amounts to a suspension of the obligation to provide work and to pay salary and benefits. There is no provision in the Act which obligates an employer to pay any salary or benefits during a period of a lay-off. That said, there is nothing stopping an employer who has the financial means from providing some level of pay and/or benefits during the period of a lay-off. In practice, many employers are providing health cover to laid-off staff.

Our view is that statutory lay-offs do not need to be incorporated into contracts of employment before giving effect to a valid lay-off necessitated by COVID-19 and that partial lay-offs (ie, where fewer hours/days are worked) cannot be effected unilaterally. We do not have short-time working legislation as in other jurisdictions.

Pursuant to the Public Treasury (Administration And Payments) (Temporary Unemployment Benefit) Regulations 2020 (the "Regulations"), employees who were in full-time employment (more than 15 hours per week) are now able to apply for emergency unemployment benefits (the "Rescue Package") where their employment has been affected because of COVID-19 (including lay-off and redundancy). The eligibility requirements are set out in the Regulations. The Rescue Package provides a payment of 60% of the employees' gross earnings up to a maximum of USD500 per week. The benefit will last for a period of 12 weeks from the date the benefit application is approved. All applications must be made by 30 June 2020.

We unfortunately expect to see further redundancies and lay-offs triggered by COVID-19 as restrictions remain in place. Regular attention must be paid to changes in COVID-19 related legislation, notices and guidance issued by the government to keep fully abreast of the ongoing right to lay off staff and effect redundancies in Bermuda, and the impact thereof.

## **Dispute Resolution in Bermuda in the COVID-19 Era**

Bermuda, like every other jurisdiction, has been managing the effects of COVID-19 and the consequential need for physical distancing measures to be put in place, masks to be worn and, in many instances, for people to work remotely. Indeed, Ber-

muda imposed on its residents a shelter-in-place order which applied throughout the month of April and is now making its way through a staged approach to reopening the island.

As with many other sectors, dispute resolution regimes in Bermuda had to quickly adapt to the restrictions in order to be able to continue providing parties with the ability to address matters between them in a world where many attorneys and indeed, judges, were working from home. In this regard, Bermuda has kept pace with other jurisdictions with virtual hearings being scheduled to ensure that cases move forward. MJM Limited's dispute resolution team has had experience with virtually run hearings and, in two instances, participated in the first of these virtually run sessions of their kind in Bermuda.

MJM Limited director, Jennifer Haworth, was counsel for one of the parties in the first conciliation meeting facilitated by the Department of Workforce Development (the "Department") pursuant to the Employment Act 2000. Allowing the parties to come together virtually to discuss the issues between them led in this instance to a resolution which permitted both parties to move forward without having to wait until the island was fully open again. The conciliation meeting arranged by MJM Limited was conducted via Zoom, which permitted not only the parties and the labour relations officer to be present but also trainees from both MJM Limited and the Department to experience the process "first hand". MJM Limited also used Microsoft Teams as a means to have breakout discussions with the client when necessary.

Additionally, Jennifer acted for one of the parties in Bermuda's first Court of Appeal hearing conducted virtually on Zoom. The Court of Appeal session would typically involve most of the members of the panel flying to the island to be physically present for the duration of the session. In light of COVID-19, this was simply not possible. However, the virtual setting created by Zoom allowed counsel for each of the parties to participate from separate locations but also the Justices of the Court of Appeal to take part from their homes which were in separate time zones. The session, arranged by the Court of Appeal office in Bermuda, ensured that there was a test session for counsel beforehand, that there was a breakout "room" for the Justices when needed during the course of the hearing and additionally that any members of the public who wished to could view the proceedings in the Zoom setting.

There are of course additional matters to consider when conducting virtual hearings. These can include the sharing of documents (which of course can be done within the virtual setting), the potential need for breakout "rooms" to allow for client or judge conferences, navigating any technological challenges (reverberation on microphones, slight delays, etc) and ensuring

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that no unauthorised recording takes place. Additionally, some thought has to be given to the fatigue that comes from lengthy video calls. All in all, though, Bermuda is addressing these matters to ensure that this technology is available and utilised to allow parties to come together and the dispute resolution regime to continue despite COVID-19 related restrictions.

## **Economic Substance**

The Economic Substance Act 2018 and the Economic Substance Regulations 2018 (together, the “ES Legislation”) requires every entity to which it applies to maintain a substantial economic presence in Bermuda by complying with the economic substance requirements set out therein. The Registrar of Companies (the “Registrar”) is responsible for implementation, monitoring and enforcement.

The ES Legislation was passed into law following a commitment by the Bermuda government to the Code of Conduct Group (Business Taxation) of the Council of the European Union to address concerns that the jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.

The ES Legislation applies to every registered entity in Bermuda, including any exempted, local and permit company, any exempted and local limited liability company (LLC) and any exempted and overseas partnership that elects to have separate legal personality (each, an “Entity”).

Only those Entities which carry on, as a business, any one or more of the following relevant activities must comply with economic substance requirements:

- banking;
- insurance;
- fund management;
- financing and leasing;
- headquarters;
- shipping;
- distribution and service centre;
- holding entity (ie, pure equity holding entity); and
- intellectual property holding.

The Registrar considers that the above activities are being carried on as a business where the Entity earns any gross income in respect of such activity during the relevant financial period.

Entities which do not carry on a relevant activity as a business are not required to comply with economic substance requirements, but are required to indicate in their annual reporting that they do not engage in any relevant activity.

A “non-resident entity” (ie, an Entity carrying on a relevant activity which is resident for tax purposes in a jurisdiction outside Bermuda that is not on the EU’s list of non-cooperative jurisdictions for tax purposes) is required to indicate in its annual reporting whether or not it is engaged in any relevant activity, but is not required to comply with economic substance requirements.

Local entities carrying on relevant activities are subject to reduced economic substance requirements. All local entities are required to indicate in their annual reporting whether or not they are carrying on a relevant activity.

Pure equity holding entities are only required to comply with minimum economic substance requirements including (i) compliance with the applicable corporate governance requirements set forth in company, LLC and partnership legislation and keeping records of account, books and papers and financial statements, and (ii) filing an economic substance declaration. They also must have adequate people for holding and managing equity participations, and adequate premises in Bermuda.

All other Entities carrying on relevant activities must maintain a substantial economic presence in Bermuda, and, in that regard, comply with full economic substance requirements. These requirements will be met if:

- the entity is managed and directed in Bermuda;
- core income generating activities are undertaken in Bermuda with respect to the relevant activity;
- the entity maintains adequate physical presence in Bermuda;
- there are adequate full time employees in Bermuda with suitable qualifications; and
- there is adequate operating expenditure incurred in Bermuda in relation to the relevant activity.

These Entities must file an economic substance declaration (the “ES Declaration”) annually, with information provided in relation to the previous financial year (the “relevant financial period”), no later than six months after the last day of each relevant financial period. The ES Declaration must demonstrate compliance with the economic substance requirements. There is an offence of knowingly making a false economic substance declaration.

If the Registrar determines that an Entity:

- has not complied with the applicable economic substance requirements in respect of its relevant activities for a relevant financial period; or
- is engaged in a high-risk IP related activity with an affiliate outside Bermuda,

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the Registrar is required to provide to the Minister of Finance (the “Minister”) the information filed in the ES Declaration and related information.

Any evidence provided to the Registrar by a non-resident entity of its claim to be resident for tax purposes outside of Bermuda must also be forwarded to the Minister.

The Minister is required to provide that information to his or her counterpart in the relevant EU member state or other jurisdiction in which the relevant Entity or non-resident entity has its holding entity, its ultimate parent entity, an owner or beneficial owner, or where the relevant non-resident entity claims to be resident for tax purposes.

Sanctions for non-compliance run in the notice to comply scheme and the civil penalty scheme. There are three stages in each scheme and Entities are allowed between 30 and 180 days to remedy non-compliance after each notice is issued. If there is a continued failure to comply, the Registrar may apply for a court order requiring specific action to be taken, to restrict the conduct of business or to strike off the entity.

## “60:40 Rule” Amendment

Bermuda’s Companies Act 1981 contains two principal categories for companies:

- “local companies”, which are usually incorporated by Bermudians to trade primarily in Bermuda; and
- “exempted companies”, which are usually incorporated by non-Bermudians for the purpose of conducting business outside of Bermuda.

Local companies are subject to the 60:40 rule which requires local companies to be “controlled” by Bermudians, with “control” being defined as the percentage of Bermudian directors and the percentage of its shares beneficially owned by Bermudians in the company being not fewer than 60% in each case.

The 60:40 rule has general application and is primarily found in Section 114(1)(a) of the Companies Act 1981 and Part 1 of the Third Schedule to that Act and the prohibition thereunder to the 60:40 rule of non-Bermudians holding a controlling influence in a local company operates to prevent any commercial agreements or arrangements that may have conferred voting control or imposed constraints on the effectiveness of majority votes from the Bermudian board of directors or the shareholders in general meetings.

There is a distinction drawn there between local companies incorporated in and controlled by Bermudians, which may carry on business in Bermuda, and other companies, which,

unless they are deemed exempted, must obtain a Section 114B licence from the Minister of Finance to carry on such business.

Factors the Minister of Finance takes into account when considering an application for a Section 114B licence are:

- the economic situation in Bermuda and the due protection of persons already engaged in business in Bermuda;
- the nature and previous conduct of the company and the persons having an interest in the company whether as directors, shareholders or otherwise;
- any advantage or disadvantage which may result from the company carrying on business in Bermuda; and
- the desirability of retaining in the control of Bermudians, the economic resources of Bermuda.

Certain exceptions have been made to the 60:40 rule - as of 2012 a local company may be exempted if its shares are listed on a designated Stock Exchange and the company conducts business in a material way within a “prescribed industry”, or if the company is a wholly owned subsidiary of said listed company. The prescribed industries have been identified as those which are capital heavy and include, inter alia, telecommunications, insurance, hotel operations, banking, international transportation (via aircraft or ship) or energy.

Exempted companies are also restricted from carrying on business in Bermuda unless it has been granted a licence pursuant to Section 129A of the Companies Act 1981 by the Minister of Finance. Where the granting of a licence thereunder is subject to it being in the best interests of Bermuda.

The following are certain activities which are expressly excluded from the requirement for a licence:

- doing business with other exempted undertakings (eg, exempted companies, permit companies, exempted unit trust schemes and exempted partnerships) in furtherance of the business of the exempted company that is being conducted outside Bermuda;
- carrying on business as a manager or agent for, or consultant or advisor to, any exempted company or permit company which is affiliated (whether or not incorporated in Bermuda) with the exempted company or an exempted partnership in which the exempted company is a partner or, in the case of mutual funds, selling or distributing their shares in Bermuda; and
- dealing in securities of exempted undertakings, local companies or partnerships.

The 60:40 rule has been described as a “sacred cow” for Bermuda, but in an attempt to stimulate economic growth, a proposed

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relaxation of the existing 60:40 rule was presented in February 2020 by the Minister of Finance, when he confirmed the government's intention to introduce a bill that will reduce the required ownership of a local Bermudian company from 60% Bermudian to 40% Bermudian, while maintaining the requirement for the board of directors to be not fewer than 60%.

The proposed relaxation will provide the ability for majority non-Bermudian ownership of a local company, without the need to seek an exemption from the 60:40 rule by obtaining a Section 114B licence (although a non-Bermudian wishing to hold more than 60% of the shares of a local company will still be able to go down this route). The previous requirement for Bermudian control of the shares in local companies will now be eliminated.

The total voting rights in a local company at board level to be held by Bermudian directors remains unchanged at 60%. Provided that the Bermudian directors in a local company remain at not fewer than 60% and they are (i) free to vote in the best interests of the company and (ii) not subject to the direction of the non-Bermudian shareholders, the new bill grants de-facto control to the non-Bermudians at shareholder level. The business of the company will remain managed by Bermudian directors at board level, who are empowered to take decisions for, and exercise all the powers (not otherwise reserved for shareholders) of, the local company.

It is understood, at the time of writing, that this new bill will be introduced in the 2020/2021 budget session.

## **Conclusion**

The prevailing mood is one of cautious optimism that the COVID-19 slowdown could lead to an incredibly busy end to the year for Bermuda as an international finance centre. Whilst many in the international business sector may reinvent themselves in a more streamlined form, with virtual meetings and working from home for some staff becoming part of the fabric of the business, there remains a real concern that the missed summer season will prove a fatal blow to many in the tourist trade on the island. However, we do have a new airport soon to be completed and new resorts which should be finished ready for 2021, so those who can hold on may be rewarded with a sharp recovery next year. We must hope that some of those laid off or made redundant in the wake of the COVID-19 restrictions will find employment once again as we bounce back with renewed vigour.

Bermuda has weathered, and rebounded from, plenty of storms over the years. It will take some doing this time, but there is a determination to succeed, and a willingness to consider alternative policies and ways to do business, which augur well for the future prospects of this paradise island in the mid-Atlantic.

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**MJM Limited** is one of Bermuda's leading law firms. It has a broad ranging practice with a reputation for excellence in its core practice areas. The firm is regularly retained by leading international law firms. MJM Limited offers practical, common sense advice based on an in-depth knowledge of the legal, regulatory and commercial environment in Bermuda. It also offers a high degree of director involvement in the work that

it does. The firm is organised around five core practice areas: corporate and finance; dispute resolution; employment and immigration; private client and property. Each practice area is led by a director who is recognised as a leading practitioner in Bermuda in his or her respective field of specialisation. MJM Limited's collaborative approach across practice areas enables it to offer a comprehensive and thorough service to clients.

## Authors



**Jeremy Leese** is a director of the firm and head of the corporate department at MJM Limited. Jeremy's practice focuses on corporate finance, mergers and acquisitions, shipping and aviation finance, corporate reorganisations and restructurings, banking and international real estate finance, structured finance, as well as regulatory and legislative compliance. After qualification with a magic circle firm in the UK, Jeremy practised corporate law in the UK for four years before moving in 1999 to one of the leading offshore law firms and working in their Bermuda, Hong Kong, Jersey and British Virgin Islands offices. After a spell heading the corporate and commercial team at a firm in Anguilla, Jeremy returned to Bermuda with MJM Limited in August 2012.



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**Jennifer Haworth** is a director in the dispute resolution team and is also a member of the employment and immigration team at MJM Limited. She has extensive experience in civil and commercial matters including security enforcement, banking, receiverships, insolvency, property related disputes, employment/immigration, judicial review and public law. Her practice includes acting for both local and international clients with advisory work as well as appearing in mediations, arbitrations, employment tribunals, the Human Rights Commission and all levels of the courts, including the Court of Appeal in Bermuda. She is a skilled negotiator and uses a practical approach to achieve the best results for her clients. Jennifer is also a seasoned public speaker and regularly presents to clients and various industry sectors on recent legal developments. Prior to joining MJM Limited in June 2012, Jennifer was an associate with Conyers Dill & Pearman in their litigation department from 2006 to 2012.



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