

# CONSULTATION PAPER

## Unfair dismissal qualifying period for employees working under short, fixed-term contracts



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### SECTION 1 - PURPOSE OF CONSULTATION

The Minister for Social Security (the 'Minister') has directed the Employment Forum (the 'Forum') to consult on two distinct areas of the Employment (Jersey) Law 2003 (the 'Employment Law') by the end of 2015. This consultation is about one of those issues<sup>1</sup>; the unfair dismissal qualifying period for employees working under short, fixed-term contracts.

Employees working under fixed-term contracts of 26 weeks or less qualify for protection against unfair dismissal after having served two-thirds of their contract and subject to having worked at least 13 weeks of their contract. The Forum has specifically been asked to consult on the potential impact of removing this rule.

The Forum is seeking the views of stakeholders and will consider any comments received before making a recommendation to the Minister. This paper sets out the background and the position in the UK, Guernsey and the Isle of Man.

### SECTION 2 – BACKGROUND

The Employment Law requires that, in order to qualify for protection against unfair dismissal, employees must have served a period of continuous service<sup>2</sup> - either 26 weeks' service if the employment contract started prior to 1 January 2015, or 1 years' service if the contract started on or after 1 January 2015<sup>3</sup>.

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<sup>1</sup> The other areas of consultation relates to compensation awards in respect of written terms of employment, pay slips and rest days. That consultation can be found on the website [www.gov.je/consult](http://www.gov.je/consult)

<sup>2</sup> Article 73(1) of the Employment Law

<sup>3</sup> The Employment Law also sets out a number of grounds for dismissal that are unfair from day one of employment. These include asserting a statutory right, asserting the right to the minimum wage and dismissal or selection for redundancy on grounds relating to trade union activities and membership.

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However the Employment Law also makes a separate and different provision for those who are employed under fixed-term contracts for 26 weeks or less. These employees are protected against unfair dismissal once they have completed at least two-thirds of their fixed-term contract, subject to the employee having at least 13 weeks' continuous service under that contract of employment<sup>4</sup>. This is known as the 'two-thirds rule'.

#### Example scenarios

A 12 week fixed-term contract – the employee will not qualify for protection against unfair dismissal within the term of the contract because they will not reach the 13 week minimum period of service.

A 15 week fixed-term contract – the employee will qualify for protection against unfair dismissal after serving 13 weeks of the contract. Two-thirds of 15 weeks is 10 weeks, however the 13 week minimum period of service will apply.

A 24 week fixed-term contract – the employee will qualify for protection against unfair dismissal after serving 16 weeks of the contract.

A 39 week fixed-term contract that started on 1 December 2014 – the contract is for more than 26 weeks and so the two-thirds rule does not apply. The qualifying period will be 26 weeks because the contract started before the 1 year qualifying period was introduced.

A permanent contract that started on 1 February 2015 – the two-thirds rule does not apply. The employee will qualify for protection against unfair dismissal after one years' service.

The two-thirds rule was created and recommended by the Forum in 2001<sup>5</sup> as a Jersey-specific rule to protect seasonal workers and to guard against employers avoiding paying a contractual bonus at the end of the season by early termination of the fixed-term contract. At that time, concern had been expressed that staff on short fixed-term contracts and seasonal workers would never acquire protection against unfair dismissal and that employers might increase their use of fixed-term contracts to prevent employees accruing this right.

<sup>4</sup> Article 73(3) of the Employment Law

<sup>5</sup> According to the Employment Forum's first recommendation on unfair dismissal in December 2001

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Consultation at that time had suggested a need to provide an equitable system for the high proportion of seasonal workers in Jersey and it was proposed that there should be a different qualifying period for short, fixed-term contracts, whether seasonal or otherwise. The Forum therefore recommended in 2001 that employees who enter into contracts of 26 weeks or less with a particular employer should qualify to lodge a claim for unfair dismissal if they have completed a period of two-thirds or more of their contract.

The former Minister for Social Security (the 'former Minister') had considered the possibility of removing the two-thirds rule from the Employment Law in 2014 so that there would not be a shorter qualifying period for employees working under fixed-term contracts of 26 weeks or less. In March 2014, the former Minister asked the Forum to consider the matter and to take into account the following points:

- Employers may be deterred from using short, fixed-term contracts, even when they have a genuine short-term requirement for staff, if they are concerned about inadvertently falling foul of the law. The two-thirds rule may have contributed to an increase in the use of zero-hours contracts in Jersey. The removal of the rule could make short, fixed-term contracts more appealing to employers, leading to a possible reduction in the use of zero-hours contracts where short, fixed-term contracts are more appropriate and could give employers the confidence to take on additional staff for short contracts and temporary work, e.g. in construction projects, potentially stimulating business and the economy.
- The removal of the two-thirds rule would provide greater equity between employees, irrespective of the length of the employment contract, and employees would continue to be protected against the abuse of rolling fixed-term contracts. If short, fixed-term contracts replace some of the existing zero-hours contracts that may be being used inappropriately, this could give employees greater certainty about hours, pay and the rights that come with employee status.

The Forum responded that it appreciated the motivation to remove barriers to the creation of new jobs and opportunities, but concluded that it could not provide the former Minister with a view on the proposal to remove the two-thirds rule from the Employment Law without consulting directly with stakeholders to properly consider the impact of removing the rule. The Forum acts as a non-political consultative body that reports to the Minister with recommendations based on the views received through consultation and other evidence available to it.

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When the one-year qualifying period for protection against unfair dismissal was introduced from 1 January 2015, the Minister committed to asking the Forum to consult on the two-thirds rule in 2015 with a view to removing it. The Minister had noted that employees on fixed-term contracts of 26 weeks or less have the right to claim unfair dismissal much sooner than an employee on a longer fixed-term or permanent contract (between 13 and 39 weeks earlier). By leaving the two-thirds rule in place alongside the new one year qualifying period, this disparity is exacerbated. Removing the two-thirds rule is one option that has been suggested to provide consistency in the rights of employees working under different types of contracts.

The Forum understands that there have been no Tribunal cases to date in which an employee has relied upon the two-thirds rule to qualify for protection against unfair dismissal. During 2014, 140 complaints were registered with the Employment Tribunal that included a complaint of unfair dismissal. All 140 complainants had more than 26 weeks' service with their employer.

### **SECTION 3 - OTHER JURISDICTIONS**

#### **UK**

In the UK, the right to take an unfair dismissal complaint to the tribunal depends on the employee establishing a 2 year qualifying period of service. The qualifying period has often been amended, ranging from 26 weeks to two years since the protection was introduced in 1971. There is no equivalent of the two-thirds rule and the 2 year qualifying period applies in the same way to fixed-term contracts as it does to permanent contracts.

#### **Isle of Man**

The qualifying period for protection against unfair dismissal in the Isle of Man has remained at one year since the legislation was introduced in 1991. There is no equivalent of the two-thirds rule and the one year qualifying period applies in the same way to fixed-term contracts as it does to permanent contracts.

#### **Guernsey**

The qualifying period for protection against unfair dismissal in Guernsey is one year. There is no equivalent of the two-thirds rule and the one year qualifying period applies in the same way to fixed-term contracts as it does to permanent contracts.

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Guernsey's unfair dismissal legislation does provide, however, that where a person is employed under a fixed-term contract of one year or more, they may agree via the contract of employment to waive their right to claim unfair dismissal. In such a case, where a fixed-term contract ends and is not renewed, the employee would have waived their right to claim unfair dismissal. The UK legislation has previously included an equivalent provision but it was removed in 2002 as a result of the Fixed Term Employees (Prevention Of Less Favourable Treatment) Regulations 2002, prompted by an EU Directive. The Employment Protection (Guernsey) Law, 1998 pre-dates the change in the UK.

### SECTION 4 - RESPONDING TO THE CONSULTATION

The Forum would be grateful to receive your comments on the issues highlighted in this consultation paper. You can respond in the following ways:

- complete the online survey [www.gov.je/consult](http://www.gov.je/consult)
- email or post your comments to

Kate Morel  
Employment Forum Secretary  
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La Motte Street  
St Helier  
JE4 8PE

Email [E.Forum@gov.je](mailto:E.Forum@gov.je)  
Telephone 01534 447203

If you require a paper copy of the survey questions, please contact the Forum Secretary.

**Please respond by 17 June 2015.**

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