

RECOMMENDATION

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



Presented to the Minister for Social Security on 11 December 2015

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SECTION 1 - INTRODUCTION

The Minister for Social Security (the ‘Minister’) directed the Employment Forum (the ‘Forum’) to consult on the unfair dismissal qualifying period for employees working under short, fixed-term contracts.¹

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 was asked to consult on the Minister’s proposal to remove this rule.

The Forum issued a public consultation paper and has set out a summary of the comments received, as well as the other evidence that was taken into account, in support of this recommendation to the Minister.

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 service² - either 26 weeks’ service if the employment contract started prior to 1 January 2015, or 52 weeks’ service if the contract started on or after 1 January 2015³.

¹ The Minister also directed the Forum to consult on compensation awards in respect of written terms of employment, pay slips and rest days. Details can be found on the website www.gov.je/Government/Consultations/Pages/CompensationAwardsTermsOfEmployment.aspx

² Article 73(1) of the Employment Law

³ The Employment Law also sets out a number of grounds for dismissal that are unfair from day one of employment.

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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 employment⁴. This is known as the 'two-thirds rule'. For example, an employee working under a 12 week fixed-term contract 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. However, an employee working under 15 week fixed-term contract will qualify for protection against unfair dismissal after serving 13 weeks of the contract.

The two-thirds rule was created and recommended by the Forum in 2001⁵ 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.

Consultation at that time had suggested a need to provide additional protection 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 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 whether the two-thirds rule should be removed from the Employment Law 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.

⁴ Article 73(3) of the Employment Law

⁵ According to the Employment Forum's first recommendation on unfair dismissal in December 2001.

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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 were to replace some of the existing zero-hours contracts, this could give employees greater certainty about hours, pay and employment rights.

The Forum responded that it would need to consult 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.

When the 52 week 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 during 2015 with a view to removing it. The Minister had noted that an employee on a fixed-term contract of 26 weeks or less has 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 52 week 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, in the ten years since the Employment Law came into force, there have been no Tribunal hearings in which an employee has relied upon the two-thirds rule to qualify for protection against unfair dismissal⁶. During 2014, 140 complaints were registered with the Employment and Discrimination Tribunal that included a complaint of unfair dismissal. All 140 complainants had more than 26 weeks' service with their employer.

⁶ JACS has advised the Forum that, in the past 10 years, there has been one unfair dismissal complaint to the Tribunal that would have relied upon the two-thirds rule, however the complaint was settled before reaching a hearing.

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There is no equivalent of the two-thirds rule in the UK, Isle of Man or Guernsey. More detail about the qualifying periods in those jurisdictions was provided in the Forum's consultation paper which can be found on the website⁷.

SECTION 3 - CONSULTATION

The Forum consulted during the period 5 May to 17 June 2015 by issuing a consultation paper and survey to around 300 individuals, organisations and interested parties. Written submissions were received from 36 respondents in the following categories;

Employer	21
Employee	4
Employers' association	1
Trade union / staff association	1
Other	9
TOTAL	36

The employer respondents were from a range of sectors including wholesale and retail, financial services, the public sector, transport, storage and communications, hotels, restaurants and bars, and construction.

Some of the responses represent the views of a group rather than an individual respondent;

- The Jersey Branch of the Chartered Institute of Personnel and Development (the 'CIPD Group, Jersey branch') is a professional body made up of 15 committee members representing a range of industries in the Island. The CIPD Group, Jersey branch collated responses from 15 of its members, including via an online survey that asked questions that differed from the Forum's online survey. The responses collected by the CIPD Group, Jersey branch have therefore been presented separately in this section.
- Prospect is a trade union that represents its Jersey membership in a range of sectors across the private and public sectors to promote and protect the interests of professionals at work. The response was submitted by Prospect's negotiator for Jersey.

⁷ www.gov.je/Government/Consultations/Pages/UnfairDismissal.aspx

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- One employers' association responded on behalf of its membership.
- The response of the Jersey Advisory and Conciliation Service (JACS) was prepared by the Director of JACS following discussion with the members of the JACS Board⁸. In addition, the Director of JACS met the Forum to discuss her practical experience of the two-thirds rule and to provide general context around the potential impact of removing, adjusting or retaining the two-thirds rule.

The Jersey Chamber of Commerce circulated the Forum's survey to its membership and encouraged employers to submit individual responses, rather than submitting a collated response on behalf of the membership.

Outcomes –

This section provides an overview of the consultation outcomes. A selection of comments has been included in this section for illustration purposes. Where the respondent has agreed to be quoted anonymously, quotes are attributed to the respondent type and sector where available. A list of some of the additional comments is included in Appendix 1.

a) Use of short fixed-term contracts

In order to provide context to the responses, employers were asked whether they employ staff on fixed-term contracts of 26 weeks or less. None of the respondents said that they **regularly** employ staff on fixed-term contracts of 26 weeks or less, but three-quarters (75%) of the respondents said that they employ staff on fixed-term contracts of 26 weeks or less either **occasionally** or **seasonally**.

Of those branch members who responded to the separate CIPD Group, Jersey branch survey, 57 percent said that they employ staff on fixed-term contracts of 28 weeks or less.

b) Awareness of two-thirds rule

In order to provide further context, all respondents were asked if they were aware that staff employed under fixed-term contracts of 26 weeks or less qualify for protection against unfair dismissal sooner than employees on other types of

⁸ Based on a tripartite structure, the JACS Board comprises representatives from a broad cross section and includes those with experience of representing employees, those with experience of representing employers and independent members. See the website www.jacs.org.je/about-jacs/jacs-constitution/

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contracts. More than half of the respondents (56%) said that they were aware of this rule.

Of the respondents who said that they occasionally or seasonally employ staff under fixed-term contracts of 26 weeks or less, a greater proportion – 63 percent - were aware that staff employed under fixed-term contracts of 26 weeks or less qualify for protection against unfair dismissal sooner than employees on other types of contracts.

c) Importance of two-thirds rule in decision to employ staff

All respondents were asked, in their experience, how important a factor the two-thirds rule is when an employer is deciding whether to employ more staff. Just over six in ten of the respondents (61%) said that the two-thirds rule is either an important factor or a very important factor. The two-thirds rule is not an important factor for 39 percent of the respondents.

Of the respondents who employ staff under fixed-term contracts of 26 weeks or less (either occasionally or seasonally), almost seven in ten of the respondents (69%) considered the two-thirds rule to be an important or very important factor when an employer is deciding whether to employ more staff. The two-thirds rule is not an important factor for 31 percent of these respondents.

The respondents who were **not** aware that staff employed under fixed-term contracts of 26 weeks or less qualify for protection against unfair dismissal sooner than employees on other types of contracts were more likely to consider the rule to be an important factor in recruitment decisions than those who were aware of the two-thirds rule.

- 73 percent of the respondents who **were not aware** of the rule considered it to be an important factor or a very important factor when an employer is deciding whether to employ more staff.
- 47 percent of the respondents who **were aware** of the rule considered it to be an important factor or a very important factor when an employer is deciding whether to employ more staff;

The responses appears illogical. However, it is possible that a lack of familiarity with the two-thirds rule caused some respondents to be unduly concerned about the **potential** importance of the rule, with no experience of it in practice.

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Comments from respondents who said that the two-thirds rule is important or very important in decisions about whether to employ more staff included the following;

“To encourage employers to provide more employment opportunities on a fixed-term basis, the law has to take into account that the majority of employers take 6 months to review an individual's performance before their confirm this is to the required standard. With the two-thirds rule, this opportunity is not available. A person is either terminated or possibly confirmed in a role before an organisation can make an informed decision without the risk of a claim of unfair dismissal.” (Anonymous employer, Charity)

“Seasonal demand means fluctuating staff levels. time to train etc still takes the same amount of time.” (Anonymous employer, Transport, storage and communications)

“I have not yet had to engage a temporary member of staff for over 13 weeks. However it would potentially be very relevant if, for example, I was having to obtain cover for a member of staff on maternity leave or long term sick leave.” (Anonymous employer, Law)

The Forum notes that the Employment Law makes provision so that where an employer has taken on a replacement employee to cover for a period of absence due to pregnancy, childbirth, on maternity grounds or on medical grounds, the dismissal of that replacement employee when the permanent member of staff returns to work will be automatically **fair**⁹.

Comments from respondents who said that the two-thirds rule is not important in decisions about whether to employ more staff included the following;

“This just causes confusion. it is easier to use fixed term contracts that expire before any qualifying period or genuine zero hours contracts.” (Anonymous respondent, Judge)

“Only because employers will recruit as needed and it is only at the point of termination especially if it is an early closing of the contract ie 24 week contract is the employer at risk by closing the contract at week 20.” (JACS)

⁹ Article 71 of the Employment Law

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d) Options for the two-thirds rule

Respondents were asked if they agreed with three options in relation to the two-thirds rule; retain the rule, remove the rule or adjust the rule¹⁰.

- i) Retain the current rule – This would mean that those employed under fixed-term contracts of 26 weeks or less would continue to be protected against dismissal earlier than those on longer fixed-term contracts or permanent contracts.

Retaining the two-thirds rule was supported by 20 percent of the consultation respondents. Of the respondents who were aware of the two-thirds rule prior to the consultation, 16 percent supported retaining the rule.

One respondent who supported retaining the two-thirds rule commented as follows;

“Unfair dismissal should be unfair from day one. The two thirds rule appear proportionate for employers who wish to be able to “unfairly” dismiss employees early on. Whilst the concept of being allowed to “unfairly” dismiss is clearly against good employment practice, there should be reasons for dismissal that are automatically unfair as “day one rights”; protection from dismissal for any reason related to a protected characteristic (as defined in the UK Equality Act 2010) would be a sound base to use.”
(Bob King, Prospect)

The Forum notes that the Employment Law already includes “day one” rights to protection against unfair dismissal on a number of grounds. These include where an employee is dismissed for asserting a statutory right, where the dismissal is connected with the employee’s pregnancy or maternity, and where the dismissal is an act of discrimination under the Discrimination (Jersey) Law 2013. These rights are set out in Articles 65 to 70A of the Employment Law.

Only one other comment was received from a respondent who supported retaining the current rule. The employee respondent was not willing to be quoted but the reason given was to provide fairness for employees working under less stable contracts.

¹⁰ Respondents were permitted to agree with more than one option and so the total for the three options is more than 100.

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- ii) Adjust the two-thirds rule – This would mean that employees on fixed-term contracts of 52 weeks or less would qualify for protection against unfair dismissal after serving two-thirds of their contract, subject to a minimum of 26 weeks' service.

Adjusting the two-thirds rule was supported by 9 percent of the consultation respondents. Of the respondents who were aware of the two-thirds rule prior to the consultation, no respondents supported adjusting the rule.

Only one comment was received from a respondent in support of adjusting the rule. The respondent was not willing to be quoted but the reason given was a desire to provide maximum flexibility for employers.

- iii) Remove the two-thirds rule – This would mean that all employees would be subject to the standard qualifying periods - 26 weeks' service if the employment contract started prior to 1 January 2015, or 52 weeks' service if the contract started after that date.

Removing the two-thirds rule was supported by 74 percent of the consultation respondents¹¹. Of the respondents who were aware of the two-thirds rule prior to the consultation, 79 percent of the respondents supported removing the rule.

Comments from respondents who supported removing the two-thirds rule included the following;

“My view on this one would be to remove the two thirds rule to make it fair and consistent with permanent employees and other locations.” (HR Business Partner, financial services)

“The 2/3rd rule is out of date and no longer required- it hasn't been used in the Tribunals.” (Anonymous employment lawyer, Financial services)

“I would not provide a qualifying period for any fixed-term contract under a year's duration. The reason for this is that permanent employees require a year's service to claim unfair dismissal and therefore, the fixed-term employees should not have superior rights over a permanent employees.”

¹¹ Responses to the three options do not total 100 percent as some respondents ticked more than one option.

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“The above would encourage employers to cover short-term staffing gaps through the use of a fixed-term contract as opposed to absorbing work via overtime or using zero hours contracts.” (Anonymous employer, Charity)

“There seems no logical reason for short-term contracted staff to be operating under different terms than those afforded to all other employees.” (Anonymous employers’ association)

“Removing the rule would provide consistency and clarity and reduce concern about the risk of taking someone on for a shorter period of time.” (Anonymous employer, Law)

“There was a debate around this as it is felt this earlier protection would no longer be in place for the original purpose ie to protect seasonal employees. There have been no viable claims registered as those that use such contracts have made them for say 27 weeks therefore outside of the 26 weeks or less for 2/3rds to apply. It is quite probable the same would apply even by extending ie the FTC would be issued for 13 months or 54 weeks and then closed at say week 49 so 2/3rds would not apply... It made sense previously but no longer seems to. We could end up with employers offering permanent contracts at the start of employment with no intention of this being so. The impact on a employee therefore is a false sense of security ie a mortgage being approved on the basis of the job being a permanent one.” (JACS)

Of the members who responded to the separate CIPD Group, Jersey branch survey, 85 percent said that the two-thirds rule should be removed. Comments from the members of the CIPD Group, Jersey branch included the following;

“It is very difficult to manage, and if you have a fair notice period in the contract that should be sufficient.” (Respondent to CIPD Group, Jersey branch)

“I’m torn. On one hand I feel that people on FTCs of 26 weeks or less do need more protection, however, on the other hand I feel that more fairness should exist between contract and permanent employees to qualify for UD.” (Respondent to CIPD Group, Jersey branch)

“We feel as an employer that this is a fair agreement for both parties but does indeed restrict flexibility particularly for staff taken on late in a hospitality season.” (Respondent to CIPD Group, Jersey branch)

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e) Impact on business

Employers and employers' associations were asked to respond to a number of questions to ascertain the impact of the two-thirds rule and any change to it.

- i) Employers and employers' associations were asked if the two-thirds rule had discouraged them from employing staff on fixed-term contracts of 26 weeks or less where they had a genuine need.

Of those who responded, 32 percent said that the two-thirds rule had discouraged them from employing staff on fixed-term contracts of 26 weeks or less where they had a genuine need and 68 percent said that it had not discouraged them. One employer commented;

"Administrative burden concerns that would be spent on defending a claim."
(Anonymous employer, charity)

One respondent who was not willing to be quoted commented that the removal of the two-thirds rule would make little difference because the length of the contract offered to an employee is determined by the specific piece of work that they are being employed to undertake.

Respondents were also asked, if the two-thirds rule had discouraged them from using short fixed-term contracts, how they had overcome the need for short-term staff. A number of respondents said that they had used overtime for existing staff as well as bank staff and temps.

The CIPD Group, Jersey branch had asked its members whether they think that the two-thirds rule has contributed to an increase in the use of zero-hours contracts in Jersey. Of the members who responded, 64 percent said that the two-thirds rule has contributed to an increase in the use of zero-hours contracts in Jersey. Comments submitted by members of the CIPD Group, Jersey branch included;

"Short term contracts will be used more than Zero-hour contracts if the two thirds were removed." (Respondent to CIPD Group, Jersey branch)

"No, due to any evidence that suggests this to be the case. I believe zero hours, contracts may well have increased due to the economic climate where employers may have been cautious about cost of labour, and not having sufficient work to employ." (Respondent to CIPD Group, Jersey branch)

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- ii) Employers and employers' associations were asked, if the two-thirds rule was amended so that it was **aligned** to the 52 week qualifying period, whether this would have any impact on their business.

Of those who responded, 48 percent said that aligning the rule would have no impact, 52 percent said that this would have some impact and no respondents said that this would have a significant impact on their business.

Respondents were asked to describe any impact of aligning the rule, for example on the number of jobs and types of contracts available within their business. The respondents who said that aligning the rule would have some impact on their business commented as follows;

“Encourages employers to use fixed-term contracts.” (Anonymous employer, Charity)

- iii) Employers and employers' associations were asked, if the two-thirds rule was **removed** so that all employees are subject to the standard qualifying periods, whether this would have any impact on their business.

Of those who responded, 38 percent said that removing the rule would have no impact, 52 percent said that this would have some impact and 10 percent said that this would have a significant impact on their business.

Respondents were asked to describe any impact of removing the rule, for example on the number of jobs and types of contracts available within their business. The respondents who said that removing the rule would have either some impact or a significant impact on their business commented as follows;

“Removes the risk of employers terminating fixed-term contracts prior to the two-thirds rule for fear of claims of unfair dismissal.” (Anonymous employer, Charity)

“This would be helpful - it would be easier to apply and easier to recruit to fill short-term gaps.” (Anonymous employer, Law)

“Possibility of more vacancies.” (Anonymous employer, Transport, storage and communications)

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f) Other comments

Respondents were invited to submit comments on any other issues relating to the two-thirds rule. As an additional observation, the CIPD Group, Jersey branch commented;

“We have noted that most employers do not understand that under the law the non-renewal of a fixed-term contracts is still a dismissal, except where the job has come to an end (which will be construed as redundancy. Under article 64 (1) it is for the employer to prove it is a genuine redundancy).”
(CIPD Group, Jersey branch)

The Forum recommends that the JACS could be asked to publicise its existing guidance on fixed-term contracts and unfair dismissal¹², for example in its email newsletter.

SECTION 4 – RECOMMENDATION

The Minister had directed the Forum to consult on the two-thirds rule with a view to removing it from the Employment Law and specifically to determine any potential impact on employers and employees if the two-thirds rule were to be removed.

The majority of the consultation responses were from employers and few responses were received from employees and their representatives. However, the Forum reaches its recommendations by taking a balanced approach to the evidence and information that is available from many sources and is not persuaded by the most forcefully expressed, insistent or recurring responses.

Having considered the evidence and the consultation responses, the Forum has found that there is a clear preference to remove the two-thirds rule and responses in favour of removing the rule far outweighed those in favour of retaining or adjusting the rule. However, some of the respondents did not give reasons for supporting a particular option which has made it difficult for the Forum to determine any potential impact on employers and employees.

The Forum is conscious that almost half of the respondents were **not** aware that staff employed under fixed-term contracts of 26 weeks or less qualify for protection against unfair dismissal sooner than employees on other types of contracts and that those who were **not** aware were more likely to consider the rule to be an

¹² [www.jacs.org.je/legislation/employment-\(jersey\)-law-2003/fixed-term-contracts/](http://www.jacs.org.je/legislation/employment-(jersey)-law-2003/fixed-term-contracts/)

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important factor in recruitment decisions. It is possible that a lack of familiarity with the two-thirds rule caused some respondents to be unduly concerned about the potential impact of the rule and its relevance in employers' decisions about employing staff. The Forum has previously examined research which shows that anxiety about employment regulation means that the perception of its burden tends to be disproportionate to the actual impact on businesses, particularly amongst smaller employers.¹³

In asking the Forum to review the two-thirds rule, the Minister had noted some of the potential positive consequences of removing the rule and the Forum has considered the evidence in relation to these three points:

a) **Stimulating business and the economy**

The responses from employers suggest that removing the rule would help in terms of simplicity - by removing rules that are perceived as unnecessarily complex - and improving employer confidence to recruit to short-term opportunities. Of the employer respondents who use short fixed-term contracts, almost 7 in 10 considered the rule to be important or very important when deciding whether to employ more staff. Other consultation responses indicated that employers are generally not influenced by the shorter qualifying period for protection against unfair dismissal. Employers offer the length of contract that they require for the particular job and the two-thirds rule tends not to be a consideration for most employers until the employment relationship does not work out as expected.

b) **Equity of employment rights between contract types**

Parity between employees on permanent and fixed-term contracts was an important factor for many of the respondents who supported removing the two-thirds rule. It has also been argued that removing the rule would not be more equitable because staff working under fixed-term contracts of less than 52 weeks would never qualify for protection against unfair dismissal under that contract. However, those on permanent contracts who are dismissed after less than 52 weeks also would not qualify for protection against unfair dismissal. The Forum acknowledges the argument that greater protection should perhaps be provided due to the insecure nature of fixed-term contract employment. However, the Forum also recognises that many people who work under fixed-term contracts do so

¹³www.gov.je/SiteCollectionDocuments/Benefits%20and%20financial%20support/WR%20Employment%20Forum%20recommendation%20on%20representation%20at%20disciplinary%20and%20grievance%20procedures%20070412.pdf

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through choice and are satisfied with the arrangement (e.g. seasonal work and students).

c) Reducing inappropriate use of zero-hours contracts

Some of the respondents, including JACS indicated that, if concerns about the two-thirds rule are removed, some employers might be more likely to offer fixed-term contract work instead of zero-hours contract work. The Forum recognises that business decisions about recruitment and terms of employment are likely to be driven primarily by other concerns (such as workload, headcount or agency costs). However, two-thirds of the respondents to the CIPD Group, Jersey branch survey believe that the rule has contributed to an increase in the use of zero-hours contracts in Jersey and some of the employers that responded are clearly concerned about falling foul of the rule. While some employers will continue to use zero-hours contracts, the Forum considers that removing the rule could gradually lead to an increase in the use of fixed-term contracts in some industries. A fixed-term contract is likely to be perceived as providing more security and employment protection for employees than a zero-hours contract. It also has benefits for the employer, such as staff retention.

The Forum has considered three options for the two-thirds rule; retaining, adjusting or removing the rule.

- 1. Retain the current rule** – 20 percent of the respondents supported this option. If the current rule is retained, we continue to protect the same group of short fixed-term contract employees that the rule was originally designed to protect. However, since the unfair dismissal qualifying period was extended to 52 weeks, a significant and now far greater disparity exists in that these fixed-term contract employees have the right to take an unfair dismissal complaint to the Tribunal much sooner (13 to 39 weeks sooner) than other employees. The two-thirds rule was originally intended to protect those working under short and seasonal contracts which were common in the hospitality and agriculture sectors. However, the Forum understands that the season has since extended beyond 26 weeks for many employers in both sectors (for example, the Tennerfest has extended the summer season into the Christmas season for some hospitality business). In addition, JACS has advised that it is easy for employers to bypass the rule by simply offering a fixed-term contract for 27 weeks in which case the rule would not apply and the employer can close the contract when they want to (e.g. at 16 weeks). This gives less certainty to employees in terms of the period of work that is available.

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2. **Adjust the rule** – 9 percent of the respondents supported this option. If we adjust the rule, we remove protection from the original group of short-term employees that the rule was designed to protect without knowing the impact or the number of employees involved. We also protect a new group of employees - those on fixed-term contracts of between 26 and 52 weeks - with no specified reason to protect this group of employees to a greater extent than employees on other types of contracts. If the rule was adjusted to match the 52 week qualifying period, employers that are concerned to avoid potential unfair dismissal claims would be able to bypass the rule easily, as with the current rule, by offering a 53 week contract so that the rule does not apply and then dismissing before the employee has 52 weeks' service.
- **Remove the rule** – 74 percent of the respondents supported removing the rule. This option removes employment protection from the group that the rule was originally designed to protect without knowing the impact or the number of employees involved. This option is the most disadvantageous to the narrow group that it protects; those working under fixed-term contracts of up to 26 weeks who have served at least 13 weeks of that contract. Removing the rule brings parity with employees working under other types of contracts; the same qualifying period would apply to all employees. This is the simplest option and, in principle, it meets the Minister's criteria (a to c above). Removing the rule would also bring Jersey in line with other jurisdictions which do not have these restrictions around short fixed-term contracts, which may improve Jersey's competitive position with other jurisdictions. In addition, the Jersey-specific reasons for the creation of the rule have changed. Many employees in seasonal jobs will now be contracted for a longer season, or under a zero-hours contract. Given the changes in the way that these businesses tend to employ staff, the rule appears no longer to be fit for purpose. Not only is the rule not being relied upon by employees for protection against unfair dismissal, the rule may have had wider implications in terms of the types of contracts that employers are willing to offer.

The Forum has carefully considered the three options. The Forum considers that, logically, the Employment Law cannot remain as currently drafted because retaining the rule creates too great a disparity between short fixed-term contracts and other types of contracts. All three options, however, potentially disadvantage a group of people. On balance, the Forum considers that the reasons to justify removing the rule are the most compelling. To summarise the main points;

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- The two-thirds rule is no longer effective in relation to its original purpose.
- The rule is not coherent within the context of the current protection against unfair dismissal after 52 weeks' service.
- The rule appears not to be understood by employers or employees and many employers are not aware of the rule at all.
- Employers and employees are no longer seeking advice from JACS about the rule.
- The rule may be unnecessary; the protection has not been relied upon in an unfair dismissal hearing in the ten years since the Employment Law took effect.
- It is easy for employers to circumvent the rule, whether in its current form or adjusted to reflect the 52 week qualifying period.
- For some employers, removing the rule could remove a hurdle (whether perceived or not) in decisions about employing staff.
- Removing Jersey-specific restrictions around the use of fixed-term contracts may improve Jersey's competitiveness with other jurisdictions.

Recommendation - The Forum recommends by a unanimous decision that the two-thirds rule should be removed from the Employment Law.

This would mean that those who are employed under fixed-term contracts of 52 weeks or less would generally not qualify for protection against unfair dismissal. As with permanent employees who have less than 52 weeks service, these employees would still qualify for protection against unfair dismissal where the dismissal was for a 'day-one' unfair reason (e.g. asserting a statutory right). There is also some protection for employees working under 'rolling' fixed-term contracts in that fixed-term contracts that are separated by less than 26 weeks are treated as continuous service under the Employment Law.

The Forum also recommends that any existing fixed-term contracts of 26 weeks or less should continue to have the protection of the two-thirds rule for their duration. The change to the Employment Law should only apply to any new contracts that are entered into after the date on which the change takes effect. As the rule only applies to fixed-term contracts of 26 weeks or less, this transitional provision would apply for a maximum of 26 weeks after the change to the Employment Law took effect.

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Appendix 1 – Consultation questions and quoted responses

Respondents were asked to give reasons for their responses to many of the questions and a selection of the comments that were provided (that have not already been quoted in Section 3 of this recommendation) are quoted below.

1. In your experience, how important a factor is the two-thirds rule when an employer is deciding whether to employ more staff?

“Over such short period it is likely that any relation ship could be problematic and it seems unfair to have a shorter period, possible discouraging employment.” (Anonymous employer, Wholesale and retail)

“A guide for seasonal trends, following a trial period without contract.” (Anonymous employer, Tourism)

“If there are genuine reasons to dismiss these can be applied fairly at any time. To make an allowance for an employer to “unfairly” dismiss up to a point in time appears perverse.” (Bob King, Prospect)

**2. Do you agree with any of the following options for the two-thirds rule?
- Retain the current rule, adjust the current rule or remove the current rule.**

Comments in support of removing the rule

“There never seems to be anything to protect the employer.” (Anonymous employer, Wholesale and retail)

“Fairness and consistency.” (Anonymous employer, Public sector)

“The State should be involving itself in private contractual arrangements between consenting parties in this way.” (Anonymous citizen)

“It is very difficult to manage, and it should be consistent with permanent contracts.” (Respondent to CIPD Group, Jersey branch)

“I believe it should be consistent with permanent contracts.” (Respondent to CIPD Group, Jersey branch)

RECOMMENDATION

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



"It is not aligned to perm staff - does not make sense to me!" (Respondent to CIPD Group, Jersey branch)

- 3. If the two-thirds rule was amended so that it was aligned to the new 52 week qualifying period, would this have an impact on your business? Please describe any impact, for example on the number of jobs and types of contracts available within your business.**

"It does not take into account seasonal trends." (Anonymous employer, Tourism)

"Possibly some positive impact - difficult to say." (Anonymous employer, Law)

- 4. If the two-thirds rule was removed so that all employees are subject to the standard qualifying periods, would this have any impact on your business? Please describe any impact, for example on the number of jobs and types of contracts available within your business.**

"Possibly may employ more staff but at present the law makes it too much of a worry to have staff. If anything were to go wrong with a problematic member of staff as a result of legal technicalities with the employment law we would end up having to close our business and ruin our own livelihood." (Anonymous employer, Wholesale and retail)

- 5. Has the two-thirds rule discouraged you from employing staff on fixed-term contracts of 26 weeks or less in situations where you have genuine need? If yes, please explain how you have overcome this issue, for example by using a different type of contract, agency work or overtime for existing staff.**

"Not yet but it would make it problematic to engage someone on a contract of over 13 weeks but less than 26 weeks." (Anonymous employer, Law)

"Again, it too much of a worry to employ people. The law is so complex and open to employees making such large claims against employers that it is not worth the worry of taking on more staff. We work 70-80 hour weeks to cover the work that needs to be done. This however gives us peace of mind that one problematic member of staff does not ruin everything we have worked for because of an employment law technicality." (Anonymous employer, Wholesale and retail)

RECOMMENDATION

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6. Are there any other issues relating to the two-thirds rule that you would like to the Employment Forum to consider?

“I believe removing of the two-third rule will help reduce the amount of Zero hour contracts”. (Respondent to CIPD Group, Jersey branch)

“I don't think as many people / companies are aware of it (or individuals) as people may think!” (Respondent to CIPD Group, Jersey branch)

“It is unfair and inconsistent and unnecessary.” (Anonymous HR professional)

“Should be abolished, along with all similar legislation which seeks to interfere with private law arrangements freely arrived at.” (Anonymous citizen)