

CONSULTATION PAPER

Qualifying period for protection against unfair dismissal



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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 the qualifying period for protection against unfair dismissal. The current 26 week qualifying period may be amended by Ministerial Order under Article 73(1) of the Employment (Jersey) Law 2003 (the 'Employment Law'). The UK has recently extended its equivalent qualifying period from one year to two years.

It has been proposed to the Minister that the qualifying period for protection against unfair dismissal should be extended. Certain employer representative groups have expressed concern that the current qualifying period deters employers from employing staff and creating new jobs, primarily due to the perceived risk of complaints to the Jersey Employment Tribunal (the 'Tribunal') and the burden of such claims. It has been suggested that, so as not to risk a potential unfair dismissal complaint, employers will often terminate contracts shortly prior to the end of the 26 week period if they are not certain about an employee's suitability for a job. It has been argued that the flexibility to continue employment for up to one year is potentially of benefit to both parties.

The Forum is seeking the views of stakeholders and will consider any comments received before making a recommendation to the Minister.

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SECTION 2 – BACKGROUND

Proposals of the former Employment and Social Security Committee

In preparing proposals for the first phase of employment legislation, the former Employment and Social Security Committee (the ‘former Committee’) had considered whether employees should be required to have served a qualifying period of employment before they become entitled to protection against unfair dismissal.

As reported in the former Committee’s Proposition to the States on ‘Employment Legislation’¹, *“after much consideration, the Committee has taken the view that an unfair dismissal is unfair whenever it occurs, and accordingly it does not propose to recommend that a qualifying period be served in unfair dismissal situations”*.

The former Committee was of the view that, if contracts were properly negotiated and clearly understood by the parties and if good disciplinary and grievance procedures were in place, it should not be necessary to require an employee to have served a qualifying period of employment before they become entitled to present a complaint of unfair dismissal to the Tribunal.

Employment Forum Consultation (2001)

The former Committee directed the Forum to consult on the matter of unfair dismissal in 2001. The Forum stated in its recommendation² to the former Committee that it became aware during consultation that many employers and members of the community were anxious that there should be a qualifying period. A recurring view seemed to be the need for employers to have the flexibility of a period of time in which to assess an employee’s suitability for a post, without the fear of having to face a possible unfair dismissal claim at that end of that period if employment is to be terminated.

Responses to the question of what qualifying period should apply, if any, are set out in Table 1.

Table 1

¹ P.99/2000, www.statesassembly.gov.je/AssemblyPropositions/2000/11737-4324-2122005.pdf

² <http://gov.je/SiteCollectionDocuments/Working%20in%20Jersey/R%20RecommendationEmploymentForumUnfairDismissal%2020091211%20EV.pdf>

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Qualifying period	Number of responses in favour
No qualifying period	11
3 months	3
6 months	9
1 year	5

Supporters of a three month qualifying period included the Jersey Citizen's Advice Bureau and the Jersey Advisory and Conciliation Service, whilst those who supported a one year qualifying period included organizations representing small businesses.

Comments received from respondents who opposed the former Committee's preferred nil qualifying period included;

"A policy of no qualifying period is unnecessary in Jersey's particular circumstances of a very mobile workforce and full employment. In practice, employers find it difficult and expensive to fill vacancies, and we do not believe there is any evidence or reasonable expectation that employers would abuse their position during any qualifying period."

"The recommendation made is over-protective for the employee at the expense of the employer. In an employee's market staff are in a strong and therefore a transient position. They can leave places of current employment and find alternative work very quickly as a result of the demands for staff already facing the marketplace."

"While it is important that such dismissals are fair, it is more difficult to justify such subjective reasons for dismissal and, as a consequence it is probable, in my view, that the enforcement body could be swamped if this proposal were to be carried."

The Forum found that, if a qualifying period was to be provided, many respondents were of the view that it should be long enough to encompass the majority of probationary periods. Respondents' comments on this issue included;

"The Forum will be aware that many employers have a probationary period, during which the termination process is slightly different to that which applies after the probationary period. The procedures allow a fair but realistic approach

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where new employees are not found to be suited to the role or the organisation. Having no qualifying period would potentially put these probationary periods at risk.”

“We believe that “no qualifying period” would effectively render probationary periods useless. It is not a question of the employer wanting to be unfair from the start of employment, more a question of ensuring that the person fits the job and vice versa.”

“During the probationary period “the employer has the opportunity of monitoring the individual’s contribution and possibly reflecting on the fact that he or she might have “got it wrong” and the probationer is unsuited to the position for any number of reasons. In this circumstance one could readily foresee the possibility of a significant number of vexatious claims of unfair dismissal.”

“We have a six month probationary period and on rare occasions we will use this to allow us to exit staff who have not met our expectations for one reason or another. This is obviously following a rigorous process to give them the opportunity to improve but without us having to use a protracted disciplinary process which is both costly in terms of time and expenditure.”

The Forum concluded in its recommendation to the former Committee that employees should have six months’ service with their employer to be entitled to protection against unfair dismissal.

In view of the concern that short fixed-term contract and seasonal workers would never acquire protection against unfair dismissal and the need to provide an equitable system for the high proportion of these workers in Jersey, the Forum recommended that provision should be made for protection against unfair dismissal where an employee has served two-thirds or more of a short fixed-term contract.

States Proposition for a nil qualifying period

Shortly prior to the States’ debate of the draft Employment (Jersey) Law 200- in July 2003, Senator Edward Vibert presented an amendment³ that would, if adopted by the States, have removed the qualifying period for protection against

³ P.55/2003(Amd)(2) www.statesassembly.gov.je/AssemblyPropositions/2003/46987-32168-972003.pdf

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unfair dismissal at Article 73 of the Law. His view was, *“it is discriminatory for an employer to be able unfairly to dismiss an employee who has worked for less than six months for the employer. Many people who have worked for less than six months for an employer are often the most vulnerable in our society - younger people starting out on their careers.”*

Deputy Patrick Ryan opposed the amendment; he stated that extensive consultation had been undertaken and that the amendments would compromise the willingness of businesses, particularly smaller ones, to take on new employees. Deputy Ryan lodged Senator Vibert’s amendment “au Greffe” so that it could not be debated by the States on the same date as the Employment Law. This meant that the debate on the Employment Law continued and the Proposition for a nil qualifying period was not debated by the States.

The Employment (Jersey) Law 2003

The Employment Law requires employees to have served 26 weeks continuous service, ending with the effective date of termination, to qualify for protection against unfair dismissal. The Law enables a different qualifying period to be set by Ministerial Order.

Exceptions

There are two exceptions to the 26 week qualifying period:

1. **Automatically unfair dismissals:** In circumstances that are regarded as automatically unfair, an employee is protected against unfair dismissal from day one of employment, which means that there is no requirement for a qualifying period of service and no upper age limit. These circumstances are specified in the law and include dismissal on any of the following grounds;
 - a) Being or proposing to become a member of a trade union, taking part or proposing to take part in the activities of a trade union with the consent of the employer, or refusing or proposing to refuse to be or remain a trade union member, or taking part in official industrial action.
 - b) Asserting or bringing proceedings against an employer to enforce a statutory right e.g. statement of terms of employment or to require the payment of the minimum wage.

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- c) Selection for redundancy on grounds related to union membership or activity, or where the circumstances of the redundancy applied equally to other employees who have not been made redundant and it can be shown that the employee was selected after asserting a right under (b).
 - d) Representing, or proposing to represent, another employee in a disciplinary or grievance hearing, or for asserting the right to be represented in such a hearing.
2. **The 'two-thirds rule'**: Fixed term contract employees who are employed under contracts for 26 weeks or less are protected against unfair dismissal once they have completed at least two-thirds of their fixed term by the effective date of termination, subject to them having a minimum of 13 weeks continuous service.

Probationary periods

It is reported that, before the Employment Law came into force in 2005, probationary periods for new employees were commonly, in some industries, six months. When the Employment Law came into force, the Jersey Advisory and Conciliation Service (JACS) advised employers to consider setting a shorter probationary period (e.g. 20 weeks) to allow the employer sufficient time to follow due process with an employee before making any decision to terminate employment prior to the 26 week qualifying period. In JACS' experience, many terms and conditions of employment in Jersey have been amended accordingly to provide a shorter probationary period.

SECTION 3 - OTHER JURISDICTIONS

UK

In the UK, the right to complain of unfair dismissal has always been dependent on the employee establishing a qualifying period of service (other than automatically unfair dismissals). That period was increased from one year to two years in 2012.

The large number of categories of dismissal where there is no qualifying period of service generally reflect those unfair dismissal rights introduced to underpin the provision and enforcement of other important statutory rights. They include;

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maternity and parental leave rights; minimum wage rights; trade union membership and activities; working time and holiday entitlements; health and safety protections; “whistle blowing” and “protected” industrial action.

The qualifying period has often been amended in the UK and it has ranged from 26 weeks to two years since the protection was introduced in 1971, as set out in Table 2.

Table 2

UK Qualifying period	Year
2 years	1971
6 months	1974
1 year	1979
1 year (or 2 years if the employer employs fewer than 20 employees)	1980
2 years (not restricted as above)	1985
1 year	1999
2 years	2012

In the 1990s, the two year qualifying period was challenged in the Seymour-Smith⁴ litigation as being indirectly discriminatory to women. This was on the basis that a two year qualifying period had a disparate impact on women because the proportion of women who would be adversely affected (in 1991 when the case was first brought) was higher than the proportion of men who would be adversely affected. The House of Lords ultimately found that the two year qualifying period was indirectly discriminatory; however it found that the discrimination was justified because that qualifying period had been introduced as a measure to encourage increased employment. The UK Government reduced the qualifying period to one year in 1999.

With effect from 6 April 2012, the qualifying period for protection against unfair dismissal increased from one to two years’ continuous service. An employee who has qualified for unfair dismissal protection prior to the law changing does not lose that protection.

The UK Government’s stated rationale for the latest increase is to make a positive impact on business confidence and thereby boost growth. The Department for Business Innovation and Skills (BIS), in its impact assessment on

⁴ R v Secretary State for Employment (ex parte Seymour-Smith and Perez)

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Resolving Workplace Disputes⁵, stated that a one year qualifying period for protection against unfair dismissal brings sufficient additional risk to an employer which is great enough in some instances to deter firms from employing additional staff and therefore acts as a potential barrier to growth and employment. A one year qualifying period was considered to be insufficient to allow an employer to fully assess an employee's performance and to resolve any problems.

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.

When the Forum was preparing its consultation on unfair dismissal in 2001, the Forum was advised that the Isle of Man was considering reducing its qualifying period from one year to nine months. There have also been calls in the Isle of Man for the qualifying period to be reduced to three months.

Guernsey

The qualifying period for protection against unfair dismissal in Guernsey is one year. When Guernsey's Employment Protection (Guernsey) Law 1998 came into force in early 1999, it set a two year qualifying period of employment, which matched the UK qualifying period at the time. The UK qualifying period was reduced to one year later in 1999.

The Employment Protection Law was reviewed in 2004 and the recommended move to a one year qualifying period came into force in 2006. The main considerations for Guernsey in reducing its qualifying period were to maintain competitiveness for businesses in recruiting staff and the potential disadvantage to an employee who works for a UK company but works in Guernsey for the first two years of their employment. There was support from both employer and employee groups for the change. The lower qualifying period was estimated as potentially leading to an additional eight to ten complaints to the tribunal each year.

Guernsey is currently keeping a 'watching brief' on the UK. Increasing the qualifying period to two years would potentially have 'disallowed' only four Tribunal complaints, out of 60 notified, during 2012.

⁵ www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1381-resolving-workplace-disputes-final-impact-assessment.pdf

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Northern Ireland

The qualifying period for protection against unfair dismissal in Northern Ireland is one year. As part of an 'Employment Law Review' consultation in May 2012⁶, the Department for Employment and Learning (the 'DEL') sought the views of stakeholders as to whether the qualifying period for protection against unfair dismissal should be increased from one year to two years.

The DEL sought evidence to support the views of employer representative bodies that an increase in the qualifying period would encourage companies to hire more staff, and reduce the number of tribunal claims.

The DEL's response to stakeholders' views was published in November 2012⁷. Employers and employer bodies were in favour of the proposal, arguing that:

- A one year qualifying period acts as a deterrent to employers taking on new employees,
- A two year qualifying period would allow for a full assessment of an employee's effectiveness, and
- There is a need to be competitive with the rest of the UK (a lower qualifying period may be a negative factor for investors when they are considering location options for investments).

A large number of respondents, including worker representatives, advisers, solicitors and trade unions were opposed to an increase in the qualifying period for the following main reasons:

- There is a lack of convincing evidence that a one year qualifying period deters employment and is therefore a barrier to growth.
- It could lead to an increase in the overall number of tribunal claims, as more employees might choose to take discrimination cases, which can be lodged from day one of employment and which can be more complex and costly.
- An increase in the qualifying period would be counter-productive to good industrial relations.

⁶ www.delni.gov.uk/employment-law-discussion-paper.pdf

⁷ www.delni.gov.uk/employment-law-discussion-paper-departmental-response.pdf

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- There might be a disproportionate impact on ethnic minorities, younger workers and women, particularly those in part-time employment
- Such a move could lead to a 'hire-and-fire' culture.
- A risk that workers in a more uncertain employment situation will be less likely to spend in the local economy.

The DEL concluded that there is a genuinely held view by employers and employer representatives that, to remain competitive with the rest of the UK and promote business confidence, the qualifying period should be increased. The DEL noted, however, there is a lack of evidence to support the contention that increasing the qualifying period would increase jobs and employment.

The DEL plans to conduct an impact assessment to establish whether there is a causal link between the extent of the qualifying period for unfair dismissal and the following factors: growth in employment, level of inward investment, and volumes of tribunal claims. Policy proposals will then be developed and consultation will be undertaken in 2013.

SECTION 4 – STATISTICS AND EVIDENCE

The Forum is seeking evidence that the length of the qualifying period for protection against unfair dismissal has, or could have, an impact on growth in employment and volumes of claims to the Tribunal.

Growth in employment

In terms of whether a longer qualifying period will lead to an increase in the number of people in employment and the creation of new jobs, the BIS impact assessment notes that *“it is not possible to directly quantify the likely impact on business confidence and in turn on hiring behaviour”*, and that *“detecting any effect is challenging”*.

In response to the latest increase in the qualifying period in the UK, the Trades' Union Congress (TUC) has commented that, *“while the qualifying period for unfair dismissal rights in the UK has fluctuated over time, the TUC believes there is no evidence that a shorter qualifying period has led to job losses or has constrained recruitment. Since 1999 when the qualifying period was last reduced*

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from two years to 12 months, more than 1,750,000 extra jobs have been created in the UK.⁸

A survey of more than 600 employers undertaken in the UK by Eversheds⁹ revealed that employers were doubtful as to whether an increase of the qualifying period would meet the stated aim of giving businesses more confidence to recruit. A survey of employers conducted by Pannone¹⁰ found that, whilst 83 percent of employers broadly welcomed the increase, only 17 percent of employers said that it would encourage them to hire more employees than they would previously have.

A survey of employers undertaken by the Jersey branch of the Chartered Institute of Personnel and Development in 2012 found that two thirds (67%) of the employers that responded felt that unfair dismissal rights should be reviewed. Comments relating to the 26 week qualifying period included that it *“urgently needs to be reviewed as I think it stops employers from employing more staff as the risk is higher”*, and *“we need to encourage new start-ups and the 6 month trigger does not encourage head count growth.”¹¹*

A longer qualifying period for protection against unfair dismissal could be one of many factors that an employer might take into account in deciding whether to employ more staff. Other factors that might impact on such a decision include;

- Whether more staff are required to deal with the level of business activity
- Whether levels of business activity are expected to change in the future
- The capacity of the business to deal with future business activity
- Whether profits can sustain additional staff.

The Jersey Business Tendency Survey (BTS)¹², undertaken by the States Statistics Unit, provides qualitative information about the Island’s economy by producing a set of ten indicators. The BTS for December 2012 shows that, across all sectors of the economy, all ten indicators continued to be negative. Three of the most strongly negative indicators were;

⁸ www.tuc.org.uk/equality/tuc-20858-f0.cfm

⁹ <http://press.eversheds.com/Latest-views/Eversheds-comment-Increase-to-the-qualifying-period-for-protection-from-unfair-dismissal-due-to-come-into-effect-b56.aspx>

¹⁰ www.hrmagazine.co.uk/hro/news/1019160/tribunal-revamp-won-t-boost-jobs-employers

¹¹ www.cipd.co.uk/NR/rdonlyres/E6E35A41-9F5D-4023-A4E0-16291C92B0BC/0/CIPDEmploymentLawReviewDec12.pdf

¹² <http://gov.je/Government/Pages/StatesReports.aspx?ReportID=832>

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- business optimism (confidence or optimism about the overall business situation in the employers' particular sector)
- capacity utilisation (e.g. the business is busier or quieter than normal)
- profitability.

Indicators were also negative for;

- business activity (the total amount of work undertaken, e.g. turnover)
- future business activity (employers' expectations for the next 3 months)
- new business (including new clients, new orders and new contracts)
- employment (the number of employees employed on average)
- future employment (employers expectations for the next 3 months).

The proportion of business in all sectors reporting a decline in business activity compared with three months previously was 19 percentage points more than the proportion of businesses reporting an increase. Forty-three percent of all businesses reported 'no change' in business activity, 58 percent reported 'no change' in employment, and 64 percent reported 'no change' in future employment.

For the non-finance sectors, all ten indicators were negative; nine of those indicators were at similar negative levels to those recorded in the previous quarter. Profitability and business optimism were the most strongly negative. For the construction sector, all indicators remained strongly negative. Six of the ten indicators for the wholesale and retail sector declined in the last quarter; capacity utilisation, profitability and business optimism were the most strongly negative indicators. In the last quarter, 64 percent of businesses in construction and 54 percent of businesses in wholesale and retail reported a decrease in business optimism.

Given the negative indications around business activity, profits, employment and future expectations, it is unclear whether a longer qualifying period for protection against unfair dismissal would be one of the main factors that would influence an employer in deciding whether to employ more staff.

Noting that the UK government has concluded that it is not possible to quantify whether extending the qualifying period would impact on business confidence or job opportunities, the Forum hopes to receive evidence from the responses to this consultation to help determine whether the qualifying period is a critical factor

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in decisions about employing staff and what difference a change to the qualifying period could make to employers and employees.

Volumes of Tribunal claims

The Forum understands that employers have expressed concern about the burden on businesses, both in terms of cost and manpower, when an employee submits a complaint to the Tribunal. According to the latest Annual Report of the Tribunal¹³, during the period 1 July 2011 to 30 June 2012, the Tribunal received 178 complaints, 16 fewer complaints than in the previous reporting period, a decrease of eight percent. The Tribunal received only two more complaints in this reporting year than it had received during its first year of operation (2005-2006).

During 2012, 150 complaints were registered with the Employment Tribunal that included a complaint of unfair dismissal. In 81 of those complaints, an outcome was recorded in the Tribunal register during 2012 (this includes complaints that were ongoing, struck out, or found in favour of the applicant or the respondent and excludes complaints that settled or were withdrawn). The length of service of those 81 complainants is shown in Table 3. Of those complainants, 84 percent had 1 years' service or more and 70 percent had two or more years' service.

Table 3

	2012
Complainants with less than 26 weeks' service	0
Complainants with 26 weeks' or more, but less than 1 years' service	12
Complainants with 1 year or more, but less than 2 years' service	11
Complainants with 2 or more years' service	57
No length of service recorded	1
Total	81

Based on the register of complaints submitted to the Tribunal in 2012, the number of unfair dismissal complaints submitted to the Tribunal could have been;

- 19 percent fewer if the qualifying period was increased to one year
- 35 percent fewer if the qualifying period was increased to two years.

¹³ www.jerseyemploymenttribunal.org/Docs/021112%20-%20ANNUAL%20REPORT.pdf

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Based on the same figures, the number of unfair dismissal cases dealt with by the Tribunal could have been;

- 15 percent fewer if the qualifying period was increased to one year
- 28 percent fewer if the qualifying period was increased to two years.

This gives some indication of the potential reduction in Tribunal complaints and hearings. However, it must be borne in mind that any change in the qualifying period is unlikely to impact on the figures to the extent described if those complainants who do not qualify for protection against unfair dismissal present other complaints that do not rely on a qualifying period of service (e.g. payment of wages and holiday pay). Of the 81 unfair dismissal complaints presented to the Tribunal in 2012 (that were not settled or withdrawn), 57 percent included at least one other complaint in addition to the complaint of unfair dismissal.

Eversheds' survey of more than 600 employers in the UK found that 78 percent of employers believed that raising the qualifying period would result in a reduction in tribunal complaints. However, there are concerns in the UK that employees will instead submit tribunal complaints on other grounds for which the qualifying period does not apply, for example, discrimination and whistle-blowing. Even if such claims turn out to be weak, an employer is still put to the cost and time of defending the claim. Such claims generally involve more complicated questions of fact and law and may result in more complex and costly disputes than unfair dismissal complaints.

The UK's Department for Business Innovation and Skills (BIS) has estimated that the move to a two year qualifying period is likely to result in a modest reduction (1,600-2,100) in the number of tribunal claims. However, given the wide range of external variables, the BIS impact assessment has been unable to assess the likely impact of this policy proposal with any certainty or establish a direct link between the level of unfair dismissal claims and changes in the qualifying period.

SECTION 5 – YOUR VIEWS

The Forum does not intend to be prescriptive in terms of how stakeholders respond to this consultation. In providing your comments on the unfair dismissal qualifying period, you may wish to consider and respond to the following questions, which the Forum considers to be of particular relevance. The Forum

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would particularly value any evidence to support any comments that you make about the potential impact on job opportunities and employment.

1. How important a factor do you think the 26 week qualifying period is when an employer is deciding whether to employ more staff?
2. Why might a longer qualifying period encourage employers to create new jobs or employ more staff?
3. If the qualifying period should be longer than 26 weeks, what period (or periods) do you think should apply?
4. What probationary periods are typically used in employment? Has there been an increase in the use of shorter probationary periods?
5. Does the 26 week qualifying period lead to early dismissals, just before the 26 week deadline, where there are no apparent fair reasons or procedures followed?
6. Is there any evidence of a link between the length of the qualifying period and growth in employment?
7. Is there any evidence of a link between the length of the qualifying period and volumes of Tribunal claims?
8. What other evidence could justify an increase in the qualifying period?
9. Are any particular groups likely to be disproportionately affected if the qualifying period is extended? In what ways?
10. Should the qualifying period of employment for protection against unfair dismissal be revised in any other way?
11. Are there any alternative proposals that merit consideration?

Questions for employers to consider -

1. Has the 26 week qualifying period been a barrier to you employing more staff? If yes, please explain why.

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2. How many staff do you employ now on average?
3. If the qualifying period was currently one year, how many staff would you employ now, on average?
4. If you would employ more staff if the qualifying period was longer than 26 weeks, why would this make a difference to your business?
5. On average, how long does it take you to determine if a new member of staff is suitable for a particular job (noting that this will vary depending on the nature of the job)?
6. Did you reduce the length of probationary periods for new members of staff when the 26 week qualifying period was introduced?

SECTION 6 - RESPONDING TO THE CONSULTATION

The Forum would be grateful if you could provide the following information with your response;

1. State your name and contact details.
2. Indicate whether your response is submitted on behalf of a particular business or organization.
3. Indicate if you want your response to be quoted anonymously, attributed to you personally, or attributed to your business or organization.

The Forum will be happy to arrange private meetings with stakeholders during the consultation period.

The Forum is very grateful for your comments on the issues highlighted in this consultation paper.

Please submit your comments no later than Friday 15 March 2013

- by email to E.Forum@gov.je, or
- by post to Employment Forum, P.O. Box 55, La Motte Street, St Helier, JE4 8PE.