

STATES OF JERSEY



DRAFT EMPLOYMENT (AMENDMENT No. 7) (JERSEY) LAW 201-

**Lodged au Greffe on 21st April 2011
by the Minister for Social Security**

STATES GREFFE



Jersey

DRAFT EMPLOYMENT (AMENDMENT No. 7) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Minister for Social Security has made the following statement –

In the view of the Minister for Social Security the provisions of the Draft Employment (Amendment No. 7) (Jersey) Law 201- are compatible with the Convention Rights.

(Signed/Deputy I.J. Gorst of St. Clement

REPORT

Introduction

From 1st January 2011, the Employment (Jersey) Law 2003 was amended to give employees the right to a compensatory payment in the event of redundancy (subject to 2 years' qualifying service).

During the process of preparing for the implementation of the Law, concerns were raised that the redundancy provisions might impact upon employers and employees utilising fixed-term contracts, particularly in seasonal industries, in a way that was not intended, due to the existing rules for calculating continuous service for the purpose of qualifying for a redundancy payment.

The current situation

The non-renewal of a contract, including the expiry or non-renewal of a fixed-term contract, is treated as a dismissal, which might be construed as a dismissal on grounds of redundancy. The definition of redundancy includes where the dismissal of an employee is wholly or mainly attributable to: *“the fact that the requirements of that business for employees to carry out work of a particular kind... have ceased or diminished or are expected to cease or diminish, permanently or temporarily for whatever reason.”*

The end of a season could be determined to fall within this definition and so a fixed-term contract employee is likely to be regarded as redundant at the end of each season. With the introduction of redundancy rights, an employee will have the right to a redundancy payment at the end of their seasonal contract if they have 2 years' continuous service.

The rules for the calculation of continuous service currently provide that if a fixed-term contract has expired and another fixed-term contract is entered into by the same parties within 26 weeks, continuity of employment is preserved. Seasonal employees can therefore accrue 2 years' continuous service over a period of years, for example; 8 month fixed-term contracts over 3 consecutive years would give the employee 24 months' accrued service.¹

The original policy intent in regard to the accrual of service via fixed-term contracts was to prevent employers abusing 'rolling' fixed-term contracts, with short gaps between them, so that employees would not qualify for protection against unfair dismissal; this intention will be maintained by not changing the existing rules for calculating continuous service for the purpose of entitlement to protection against unfair dismissal.

Concerns have been expressed to the Minister for Social Security that the extension of this policy to redundancy payments unduly impacts upon seasonal industries. Employees undertaking seasonal work will often have been employed by the same employer under short contracts over many consecutive seasons, bringing the possibility of redundancy payments at the end of each season.

¹ In the UK, employees on a series of fixed-term contracts might qualify for redundancy pay at the expiry of each contract, although contracts that are separated by less than 26 weeks do not aggregate for the purpose of calculating continuity of employment, so the same issue does not arise.

Maintaining the current rules might therefore discourage employers from re-employing the same people each year, potentially impacting on employment opportunities for local residents.

Purpose of the amendment

The primary purpose of the amendment is to ensure that employers in seasonal industries are not discouraged from re-employing staff, season after season, due to the potential for redundancy payments at the natural end of each season.

The Employment Forum has considered the existing measures and appreciates that this is likely to disproportionately impact on seasonal industries, including agriculture and hospitality, as well as fulfilment, retail and construction.

Having consulted directly with relevant stakeholders on various options to resolve the issue, the Minister considers that it is crucial that this unintended effect is addressed. Seasonal working patterns appear to have changed since the existing measures were put in place, for example in Hospitality and Agriculture the 'season' is usually longer than 6 months and there is rarely a 26 week break between seasons.

The intention is to establish an appropriate period to break service between fixed-term contracts that will minimise opportunities for employers to abuse successive fixed-term contracts to avoid employment rights, whilst being appropriate in view of current business practices, particularly in accordance with genuinely seasonal business requirements.

The Minister understands that fixed-term contracts in these industries will generally be separated by 9 weeks or more. The Employment Forum agrees that there will generally be off-peak periods of 9 weeks or more between peak business periods in the local industries that utilise short fixed-term contracts.

It is therefore proposed that the Law be amended so that, for the purpose of calculating entitlement to redundancy pay, continuity of employment will be preserved between successive fixed-term contracts that are separated by 9 weeks or less, instead of 26 weeks or less, as currently provided.

To protect seasonal employees, fixed-term contracts that are separated by 26 weeks or less will continue to be treated as continuous for the purpose of calculating continuity of employment in respect of determining an employee's entitlement to protection against unfair dismissal.

This will mean that, in the majority of cases, employees on short fixed-term contracts will not qualify for redundancy pay at the end of each season, but will continue to qualify for protection against unfair dismissal after 26 weeks' continuous service.

For consistency within the redundancy-related rights, the amendment also provides that, where employees are employed on fixed-term contracts of one year or less, the employer would be obliged to give those employees paid time off work to seek alternative employment, and to consult representatives of those employees about proposals for redundancies at the end of a season, only where the employee has previously been employed under a fixed-term contract of one year or less and the contracts are separated by 9 weeks or less (e.g. 'rolling' one year contracts). Employers will still be obliged to consult employees individually about proposals for redundancies.

- **Other amendments**

The opportunity has been taken to include the following additional amendments –

- To clarify that, when used in the context of a ‘redundancy’ (as defined in Article 2 of the Employment Law, the term ‘dismissal’ has the same meaning as described for the purpose of unfair dismissal (in Part 7 of the Employment Law).
- To clarify that for the purpose of any redundancy related payments ‘a week’s pay’ is calculated in accordance with the existing Schedule 1 to the Employment Law (subject to the cap).
- To provide that where an employee has received a redundancy payment, their continuity of employment is effectively ‘reset’ to zero if the contract is renewed, or if the employee enters into a new contract, so that service with that employer prior to the redundancy payment does not count again for the purpose of claiming any further statutory redundancy payment in future.
- To clarify the calculation of time off work to seek alternative employment or re-training that an employee who is given notice of redundancy is permitted to take.
- To reflect the decision that responsibility for the administration of the Employment Tribunal was allocated to the Judicial Greffier from 1st January 2011.

Financial and manpower implications

There are no financial or manpower implications for the States arising from the adoption of this Draft Law.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). On 19th April 2011, the Minister for Social Security made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Minister for Social Security the provisions of the Draft Employment (Amendment No. 7) (Jersey) Law 201- are compatible with the Convention Rights.

Explanatory Note

This draft Law would amend the Employment (Jersey) Law 2003 (the principal Law) mainly to deal with issues arising from the redundancy provisions introduced by Employment (Amendment No. 5) (Jersey) Law 2010, particularly relating to fixed short-term contract workers.

Article 1 is an interpretation provision.

Article 2 amends the provision in the principal Law which sets out what it means to be dismissed by reason of redundancy. The current provision refers to various reasons related to the cessation or diminution of work. The amendment makes it clear that “dismissal” itself is to be construed in accordance with the provision in the principal Law setting out the circumstances of dismissal, such as termination of the contract of employment by the employer with or without notice.

Article 3 substitutes a new Article 60B. A substituted Article 60B was also included in the Employment (Amendment No. 6) (Jersey) Law 2011- (adopted by the States on 18th January 2011). This draft Law introduces a further amendment to Article 60B and the intention is to substitute Article 60B in its entirety by this draft Law rather than bringing into force Article 60B as substituted by Amendment No. 6.

The purpose of the substituted Article is to set out the way in which employment will be computed for the purposes of entitlement to a redundancy payment. Under the principal Law a person does not have any right to a redundancy payment unless that person has been continuously employed for a period of at least 2 years computed in accordance with Article 57 of the principal Law. Article 57 provides that any week in which a person works for 8 hours or less under a contract of employment does not count in computing a period of employment. The effect of the substituted Article 60B is that any week governed by a contract of employment counts in computing a period of employment regardless of the number of hours worked.

The substituted Article 60B also makes a change in relation to fixed term contracts. Under Article 57 of the principal Law a person working under a fixed term contract is treated as being continuously employed if he or she works under another fixed term contract and the interval between the two contracts is not more than 26 weeks. Under the substituted Article 60B that interval is reduced to not more than 9 weeks.

Article 4 makes it clear that calculation of a week’s pay shall be in accordance with Schedule 1 to the principal Law for the purpose of calculating the amount of a redundancy payment.

Article 5 inserts a new provision in the principal Law to the effect that if a person has received a redundancy payment in respect of a period of employment, that period of employment breaks the continuity of employment if the employee’s contract is renewed or he or she enters into a new contract of employment.

Article 6 amends the principal Law so that the collective consultation requirements imposed on an employer in relation to employees whom the employer proposes to make redundant do not apply to any employee who is employed under a fixed term contract of one year or less unless such employee was previously employed under

another fixed term contract of one year or less by the same employer and the interval between the two contracts of employment was not more than 9 weeks.

Article 7 makes it clear that the reference in the principal Law to the amount of time off that may be taken by a person who is served with notice of redundancy in order to look for work or arrange training is calculated with reference to permitted time off rather than actual time off. The amendment also provides that this right does not apply to any employee who is employed under a fixed term contract of one year or less unless such employee was previously employed under another fixed term contract of one year or less by the same employer and the interval between the two contracts of employment was not more than 9 weeks.

Article 8 makes it clear that calculation of a week's pay shall be in accordance with Schedule 1 to the principal Law for the purpose of calculating the amount of remuneration payable to a person who is served with notice of redundancy and who takes time off to look for work or arrange training.

Article 9 provides that the Judicial Greffier shall act as Secretary of the Employment Tribunal.

Article 10 sets out the title of the draft Law and provides that it will come into force by an Appointed Day Act.



Jersey

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Arrangement

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Jersey

DRAFT EMPLOYMENT (AMENDMENT No. 7) (JERSEY) LAW 201-

A LAW to amend further the Employment (Jersey) Law 2003.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law, the “principal law” means the Employment (Jersey) Law 2003¹.

2 Article 2 amended

After Article 2(3) of the principal Law there shall be added the following paragraph –

“(4) In paragraph (1) the reference to an employee who is dismissed shall be taken to refer to an employee who is dismissed by his or her employer in accordance with Article 62.”

3 Article 60B substituted

For Article 60B of the principal Law there shall be substituted the following Article –

“60B Qualifying period of employment

(1) An employee does not have any right to a redundancy payment unless that person has been continuously employed for a period of not less than 2 years ending with the effective date of termination.

- (2) The provisions of Article 57 shall not apply in computing the period of employment for the purposes of this Article and instead the period of employment shall be computed as follows –
- (a) any week during the whole or part of which the employee's relations with the employer are governed by a contract of employment shall count in computing a period of employment;
 - (b) except so far as otherwise provided by the following provisions of this paragraph any week which does not count under sub-paragraph (a) shall break the continuity of the period of employment for the purposes of this Article;
 - (c) if –
 - (i) a fixed term contract of employment has expired in accordance with its terms, and
 - (ii) another fixed term contract of employment is entered into by the same parties which takes effect not more than 9 weeks after the expiry of the previous fixed term contract of employment,the interval between the 2 periods of employment shall not be taken to break the period of employment when computing its length, but the length of the interval shall not be counted in the computation;
 - (d) a week shall not count under sub-paragraph (a) if, in that week, or any part of that week, the employee takes part in a strike;
 - (e) the continuity of an employee's period of employment shall not be broken by a week which does not count under this paragraph if in that week, or part of that week, the employee takes part in a strike;
 - (f) the continuity of the period of employment shall not be broken by a week which does not count under this paragraph if, in that week, or in a part of that week, the employee is absent from work because of a lock-out by his or her employer.”.

4 Article 60C amended

In Article 60C(3) of the principal Law after the words “one week's pay” there shall be inserted the words “shall be calculated in accordance with Schedule 1 but”.

5 Article 60CA inserted

After Article 60C of the principal Law there shall be inserted the following Article –

“60CA Further provisions relating to continuity of employment

- (1) For the purposes of Articles 60B and 60C, if –
 - (a) an employer has paid the employee a redundancy payment under this Part; and
 - (b) the employee’s contract of employment is renewed (whether by the same or another employer) or he or she is engaged under a new contract of employment (whether by the same or another employer),

the period in which an employee has been continuously employed is deemed to be broken on the date that is the effective date of termination referred to in Article 60B(1) or 60C(1), as the case may be.
- (2) For the purposes of this Article, a redundancy payment shall be treated as having been paid under this Part if –
 - (a) the whole of the payment has been paid to the employee by the employer; or
 - (b) the Tribunal has found that the employer must pay part (but not all) of the redundancy payment and the employer has paid that part.”.

6 Article 60F amended

In Article 60F of the principal Law –

- (1) in paragraph (13) after the words “with such redundancy” there shall be added the words “but excludes any employee to whom paragraph (14) applies.”.
- (2) After paragraph (13) there shall be added the following paragraph –

“(14) This paragraph applies to an employee who is employed under a contract of employment for a fixed term of one year or less unless –

 - (a) the employee was previously employed under another contract of employment for a fixed term of one year or less;
 - (b) the parties to both contracts of employment are the same; and
 - (c) the interval between the expiry of the previous contract of employment and the commencement of the employee’s current contract of employment was not more than 9 weeks.”.

7 Article 60K amended

In Article 60K of the principal Law –

- (a) in paragraph (3)(a) after the words “that period of” there shall be inserted the word “permitted”;
- (b) after paragraph (3) there shall be added the following paragraph –

- “(4) Paragraph (1) does not apply to an employee who is employed under a contract of employment for a fixed term of one year or less unless –
- (a) the employee was previously employed under another contract of employment for a fixed term of one year or less;
 - (b) the parties to both contracts of employment are the same; and
 - (c) the interval between the expiry of the previous contract of employment and the commencement of the employee’s current contract of employment was not more than 9 weeks.”.

8 Article 60L amended

In Article 60L(2) and (3) of the principal Law after the words “one week’s pay” there shall be inserted the words “, calculated in accordance with Schedule 1,”.

9 Article 85 substituted

For Article 85 of the principal Law there shall be substituted the following Article –

“85 Secretary of Tribunal

The Judicial Greffier shall act as Secretary of the Tribunal.”.

10 Citation and commencement

This Law may be cited as the Employment (Amendment No. 7) (Jersey) Law 201- and shall come into force on such day or days as the States may by Act appoint.

¹ *chapter 05.255*