STATES OF JERSEY

DRAFT ACT ANNULLING THE EMPLOYMENT (QUALIFYING PERIOD) (JERSEY) ORDER 2014

Lodged au Greffe on 9th December 2014
by Deputy G.P. Southern of St. Helier

STATES GREFFE

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PROPOSITION

THE STATES are asked to decide whether they are of opinion –

to adopt an Act, as set out in Appendix 1, annulling the Employment (Qualifying Period) (Jersey) Order 2014.

DEPUTY G.P. SOUTHERN OF ST. HELIER

REPORT

The Minister for Social Security, in a press release issued on 5th December 2014, announced her decision to extend the qualifying period for unfair dismissal complaints from 6 months to one year.

Currently, an employee who feels that they have been unfairly dismissed may make a complaint to the Employment and Discrimination Tribunal if they have 6 months' service with their employer. The Minister has decided that, from 1st January next year, employees must have one year's service before they are entitled to make a complaint. The change will only apply to new jobs that start on or after 1st January 2015. Employees who already have a job will retain the right to claim unfair dismissal after 6 months' continuous service.

It is a matter of considerable concern to many that the ability for an employer to dismiss someone unfairly, without challenge from the employee, is to be made easier. This is a *significant* and *controversial* decision and should not have been made solely by Ministerial decision but by the Assembly as a whole.

There remain sound reasons why such a decision, with the potential for both intended and unintended consequences, should be subject to scrutiny of the wider membership as well as official scrutiny from the relevant panel, if needed. The fact is that to bring this decision, which is not time sensitive, by order rather than by regulation is a deliberate attempt by the Minister to avoid debate on the wider issues involved in employee protection. The only way to ensure any debate at this stage is via an annulment motion such as this.

However, the fact is that this decision has been thoroughly examined by the Employment Forum. The Forum reported its findings to the previous minister in June 2013. The full report is attached in at Appendix 2, but its conclusions can be summarised as follows –

> *"The Forum has found no evidence that a longer qualifying period would have a positive impact on employment and job opportunities. The Forum considered whether the consultation revealed any other reasons that might support a longer qualifying period. The Forum has concluded that the potentially detrimental impact of a longer qualifying period outweighs the potentially positive factors to such an extent that the Forum cannot recommend a longer qualifying period.*
>
> *The Forum recommends by way of a majority decision that the qualifying period for protection against unfair dismissal should remain at 26 weeks."*

The body tasked with the duty to advise the minister and the States on employment issues has clearly decided against the decision of the current Minister. One has to ask what has changed so significantly over the past 18 months to justify the Minister's contrary decision. The full Employment Forum report is attached at Appendix 2.

The JACS website clearly lays out the terms for fair dismissal as follows –

"Fair dismissal (Article 64)

3. For a dismissal to be fair the employer must show that the principal reason for the dismissal is either:

a) The capability or qualifications of the employee in relation to the kind of work he was employed to do. (Capability is in relation to skill, aptitude, health or other physical or mental quality. Qualifications relate to any degree, diploma or other academic, technical or professional qualifications that are relevant to the position).

b) The conduct of the employee.

c) That the employee was redundant (see later comments in 6 b) and e) on selection for redundancy).

d) That to continue to employ the person would be contravening a duty or restriction imposed by law (e.g. a person employed as a driver who is banned from driving).

e) Some other substantial reason of a kind that would justify the dismissal of the employee and that in the circumstances the employer acted reasonably in treating it as a sufficient reason for dismissal (e.g. the dismissal of a person specifically employed to cover another's maternity leave when the other employee returns to work; a reason associated with significant business reorganisation)."

There is no unnecessary or artificial restriction on the ability of the employer to dismiss any worker he judges to be not up to the job.

The Minister argues that a one year qualifying period will encourage employers to take on more staff and will make a real difference to locally-based small businesses. The additional 6 months to assess whether a person is right for the job should increase the number of employers who are willing to give a local jobseeker a chance through one of our Back to Work initiatives, she says.

In response to this argument the Employment Forum contains this quote –

> *"In terms of recruiting additional staff the employment qualifying factor does not play a part on whether we recruit or not, we look purely at business needs and costs, so the qualifying period has not been a barrier to employing more staff...The number of vacancies would not change depending on the outcome of this consultation."* (Anonymous employer)

To suggest that an employer cannot judge the ability of an employee to meet the requirements of a job within 6 months is to say the least surprising. To further suggest that this extension will encourage employers to take on more workers has no basis in evidence. The Chief Minister attempts some clarification when he talks of "removing one of the perceived barriers to employing staff." What then can be the nature of this "perceived barrier?"

In responding to "employer perceptions" the Forum quotes research undertaken by BIS in March 2013 –

> *"… the research found that employer perceptions did not reflect the real impact that regulation has on businesses. The report states that "Evidence of a perception-reality gap was most apparent amongst small and micro employers that did not have any formal HR policies in place. When describing their practices for managing staff, they indicated that the effect of regulation was limited and yet they described regulation as burdensome because they were anxious about litigation. This is very similar to the findings of Peck et al (2012). They showed that the perception of regulation being burdensome was influenced by anxiety and the belief that regulation was overly complex, rather than by the actual legal obligations that employers had to meet."*

The answer to this "perception" problem can be found in the next section of the JACS guide to dismissal. The actions of the employer have to be deemed reasonable, and an employee who may be facing a serious sanction (such as dismissal) has the right to seek representation at a disciplinary meeting, as follows –

> *"Reasonable or justifiable*
>
> *4. Even if the employer has grounds to dismiss the employee the Tribunal will consider whether or not the employer's action was reasonable. In so doing, it will consider the size and administrative resources of the employer, any changes in the business before or after the dismissal. The decision taken by the employer must be one that a reasonable employer would have made. What may be fair for one employer may not be fair for another and the reason must have substantial merits.*
>
> *5. Part 7A of the Employment Law gives employees the right to be represented where their employer requires or requests them to attend a disciplinary or grievance hearing and the employee tells the employer that he or she wishes to be represented at the hearing.*
>
> *This right only applies to disciplinary hearings where the hearing could result in a formal written warning or some other formal disciplinary action being taken against the employee (or the confirmation of one of the above), including appeal hearings. Informal disciplinary hearings, such as meetings to investigate an issue, do not attract the right to be represented. If it becomes clear during the course of such a meeting that disciplinary action is necessary, a formal hearing should be arranged where the employee has the right to be represented.*
>
> *The Employment Law provides that an employee may be represented by one of the following people in formal disciplinary or grievance hearings –*
>
> - *A fellow employee who is employed by the same employer,*

- *An employed trade union official (who may or may not be an official of a union that is recognised by the employer, but the union must be registered under the Employment Relations (Jersey) Law, 2007).*
- *A trade union official who is not employed by a union, but whom the union has reasonably certified in writing as having experience of, or having received training in, acting as an employee's representative at disciplinary or grievance hearings.*

In effect then, we are being told that the requirement to act in a reasonable manner, and to allow employees to have representation at disciplinary meetings, should they wish it, is perceived by some employers, especially those running SME's, as being a block to the way they wish to run their businesses. These employers wish to extend the period in which they can unreasonably dismiss workers from 6 to 12 months.

> *"It appears that employers, particularly smaller businesses, have the impression that fairly dismissing employees is almost impossible. Extending the qualifying period potentially perpetuates the myth that fair dismissals cannot be achieved and does not necessarily avoid future unfair dismissal claims."* (Employment Forum)

The Forum went on to state –

> *"A recent review of the Employment Tribunal's decisions in 2012 identified that some employers are unaware of the requirements of the Employment Law and identified a need to increase employers' awareness of the need to provide fair warning of dismissal or redundancy. It appears that more advice, support and guidance may be required by employers, rather than a longer period in which to avoid unfair dismissal complaints."*

The appropriate response to the false perceptions, and lack of understanding amongst some employers, is to continue and expand the outreach training and support offered to these employers, not to extend the period in which poor practice can continue.

The Minister also states that this change has the potential to motivate employers to offer more permanent terms and conditions of employment to employees, rather than entering into casual staffing arrangements. However, that solution, in the opinion of one law firm at least, is unlikely –

> *"As the Consultation recognises, so as not to risk a potential unfair dismissal complaint, employers may terminate an employee's employment shortly prior to the end of the 26 week period if they are not certain about an employee's suitability for a job. It is correct that such approach is often adopted by employers and does, in our experience, happen in practice. However, in our view, that in itself is not a sound basis on which to extend the qualifying period. If the qualifying period were to be increased, there is a likelihood that the practice of terminating employment shortly prior to the point at which unfair dismissal protection commences would continue. The only difference would be that employment would be terminated at 50 or so weeks (if the qualifying period were 12 months) rather than 24 or 25 weeks as happens currently… this, in turn, could lead to greater insecurity for employees…"*

Finally, we need to examine the concept of those actions which are considered to be "automatically unfair" and therefore exempt from any qualification period, whether that be 6, 12 or 24 months. In Jersey these are listed on the JACS website as follows –

> *"Automatically unfair dismissal arises in the following circumstances:*
>
> *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 within his own time or within working time 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 (irrespective of length of service or having reached retirement age).*
>
> *b) Selection for redundancy on grounds related to union membership or activity (irrespective of length of service or having reached retirement age).*
>
> *c) Asserting or bringing proceedings against an employer to enforce a statutory right e.g. statement of initial terms of employment (irrespective of length of service or having reached retirement age).*
>
> *d) Asserting or bringing proceedings against an employer to require the payment of a particular rate of minimum wage (irrespective of length of service or having reached retirement age).*
>
> *e) Being selected for redundancy unfairly in that 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 either (or both) the above paragraphs c and/or d*
>
> *f) Being dismissed for representing (or proposing to represent) another employee, or for asserting the right to be represented in a disciplinary or grievance hearing.*
>
> *g) Being dismissed for a reason which would constitute an act of discrimination under the Discrimination (Jersey) Law 2013.*
>
> *Note: The Law contains a provision that dismissal by reason of pregnancy, childbirth or maternity (irrespective of length of service or having reached retirement age) will also be automatically unfair. This provision requires Regulations to be introduced (following consultation on maternity leave etc.) prior to it becoming law. Dismissal due to pregnancy, childbirth or maternity may be unfair, but will not be automatically unfair until these Regulations are introduced."*

It is undoubtedly appropriate that dismissal for trade union activity and on racial grounds should be seen as automatically unfair, requiring no qualifying period. However, until the Discrimination (Jersey) Law is extended to cover discrimination on grounds of sex, due later in 2015, and then further, to take in discrimination on grounds of disability and sexual orientation, then the extension of the qualifying period from 6 to 12 months is a move in entirely the wrong direction.

Comparison with the situation in the UK, where there is a whole ramp of discriminatory "characteristics" long embedded in law and culture requiring no qualification period to be accessed is inappropriate.

Acceptance of the ministerial decision on this issue would, in effect, reduce protection against discriminatory dismissal for many employees.

Finance and manpower implications

There are no financial or manpower costs to acceptance of this draft Act of annulment.

APPENDIX 1

DRAFT ACT ANNULLING THE EMPLOYMENT (QUALIFYING PERIOD) (JERSEY) ORDER 2014

Made *[date to be inserted]*

Coming into force *[date to be inserted]*

THE STATES, in pursuance of the Subordinate Legislation (Jersey) Law 1960, as having effect by virtue of Article 104(8) of the Employment (Jersey) Law 2003, annulled the Employment (Qualifying Period) (Jersey) Order 2014.

APPENDIX 2

EMPLOYMENT FORUM'S RECOMMENDATION ON THE QUALIFYING PERIOD FOR PROTECTION AGAINST UNFAIR DISMISSAL
R.58/2013
Presented to the States on 14th June 2013
by the Minister for Social Security

RECOMMENDATION
Qualifying period for protection against unfair dismissal

Issued by the Employment Forum on 7 June 2013

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SECTION 1 – INTRODUCTION

The Minister for Social Security (the 'Minister') 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 employers and 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 complaints on the business. It has been suggested that, so as not to risk a potential unfair dismissal complaint, employers sometimes 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.

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SECTION 2 – BACKGROUND

The Forum's consultation paper, which can be found on the website[1], outlined the background to Jersey's current qualifying period of 26 weeks and included details of equivalent provisions in other jurisdictions. To summarise, this included information regarding;

- The proposals of the former Employment and Social Security Committee for a nil qualifying period in 2000. 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.

- The Forum's 2001 consultation and recommendation[2] for a six month qualifying period. The intention was to give employers 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. The Forum also 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 to protect the high proportion of fixed-term contract and seasonal workers in Jersey.

- An unsuccessful attempt by former Senator Edward Vibert[3] to remove the proposed 26 week qualifying period during the States debate of the Employment Law on the grounds that those who have worked for less than six months are often the most vulnerable in our society.

- The qualifying periods for protection against unfair dismissal in other jurisdictions;

    - Two years in the UK
    - One year in the Isle of Man
    - One year in Guernsey
    - One year in Northern Ireland

[1] www.gov.je/Government/Consultations/Pages/UnfairDismissal.aspx
[2] http://gov.je/SiteCollectionDocuments/Working%20in%20Jersey/R%20RecommendationEmploymentForumUnfairDismissal%2020091211%20EV.pdf
[3] P.55/2003 Amd.(2) www.statesassembly.gov.je/AssemblyPropositions/2003/46987-32168-972003.pdf

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- The history of the qualifying periods that have applied in the UK; ranging from 26 weeks to two years since the protection was introduced in 1971.

- The UK Government's stated rationale for the move from one year to two years (from 6 April 2012): to make a positive impact on business confidence and thereby boost growth. 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. However, the impact assessment undertaken by the Department for Business, Innovation and Skills (BIS) noted 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"*.

- Following consultation in 2012 on whether the qualifying period for protection against unfair dismissal should be increased from one year to two years[4], Northern Ireland's Department for Employment and Learning concluded that there is a lack of evidence to support the contention that increasing the qualifying period would increase jobs and employment.

The Employment Law

Article 73 of the Employment Law sets out the following requirements relating to the qualifying period of service for protection against unfair dismissal –

> *"(1) Subject to the provisions of paragraphs (2) to (4), Article 61[5] shall not apply to the dismissal of an employee unless the employee has been continuously employed for a period of not less than 26 weeks or such other period as may be prescribed, computed in accordance with Article 57[6], ending with the effective date of termination.*
>
> *(2) Paragraph (1) shall not apply if Article 65, 66, 67(1) or (2), 68(1), 69(1), or 70 applies*[7]
>
> *(3) If an employee is employed under a contract of employment for a fixed term of 26 weeks, or such other period as may be prescribed, or less,*

[4] Consultation www.delni.gov.uk/employment-law-discussion-paper.pdf and response www.delni.gov.uk/employment-law-discussion-paper-departmental-response.pdf
[5] Article 61 provides the right to protection against unfair dismissal.
[6] Article 57 sets out how continuous employment is to be calculated
[7] The articles provide the automatically unfair grounds for dismissal, e.g. for asserting a statutory right.

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Article 61 shall not apply to the dismissal of that employee unless at least two-thirds of the fixed term or 13 weeks (whichever is the longer) have expired on the effective date of dismissal, and for this purpose parts of a day that have expired shall be rounded up to a whole day."

The Employment Law provides that, to qualify for protection against unfair dismissal, employees must have 26 weeks' continuous service ending with the effective date of termination, other than when dismissal is on 'automatically unfair' grounds, described below. The Employment Law enables the Minister to set a different qualifying period by Ministerial Order.

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. requiring a statement of terms of employment which complies with the Employment Law or to require the payment of the minimum wage.

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.

The Employment Law also provides the 'two-thirds rule': The Forum understands that the intention of this Jersey-specific rule was to protect seasonal workers and to guard against employers routinely employing staff on short fixed-term

contracts to avoid their obligations, including to avoid paying a contractual bonus at the end of the season.

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 contract by the effective date of termination, subject to them having a minimum of 13 weeks' continuous service. The Employment Law allows the 26 week period to be amended by Order. However, the minimum of 13 weeks' service cannot be amended by Order. A delay of around one year for a primary law amendment is unlikely to be acceptable to those who support an extended qualifying period.

SECTION 3 – CONSULTATION

Method

The Forum consulted during the period 4 February to 15 March 2013 by issuing a consultation paper to around 300 individuals, organisations and interested parties. The Forum suggested that respondents might wish to consider certain questions, which are listed at Appendix 1, in preparing their response. Comments were received from the following respondents;

Employer	10
Employee	1
Employer association	3
Trade union / staff association	2
Law firm / Lawyer	4
Other	5
TOTAL	**25**

Very detailed responses were received from a number of the respondents. A selection of the responses that were received to the key consultation questions is set out in Appendix 2. The Forum believes that this overview provides a fair and balanced representation of the comments that were received.

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Evidence

The Forum had noted that the UK government had concluded that it is not possible to assess the likely impact of extending the qualifying period or to establish a direct link between changes in the qualifying period, the level of unfair dismissal claims, business confidence or job opportunities. The Forum therefore hoped to receive evidence during consultation that would help to determine whether the qualifying period is a critical factor in decisions about employing staff and what difference a longer qualifying period could make to employers and employees.

The Forum stated that it was particularly seeking evidence that the length of the qualifying period for protection against unfair dismissal has, or could have, an impact on growth in employment, job opportunities and volumes of claims to the Tribunal. The experiences of other jurisdictions suggested that such evidence might not be easy to identify.

The consultation responses were predominantly from employers and employers' representatives. The responses show a clear desire for a move to a longer qualifying period, but there appears to be little more than anecdotal evidence to demonstrate that such a change would have a positive impact on job opportunities. With so many other potentially influencing factors in business, it may not be possible or reasonable to expect that the unfair dismissal qualifying period can be identified as one of the main factors driving employment decisions.

With a lack of persuasive evidence that a longer qualifying period would encourage growth, employment, or the creation of jobs, the Forum considered whether its consultation and research had revealed any other reasons that might justify such a change. For example, whilst a longer qualifying period might not increase the number of jobs, it might encourage employers who have a job vacancy to 'take a chance', for example by employing a young person or a long-term unemployed person.

The Forum also considered whether there is any evidence to suggest that an extended qualifying period might have any negative impact. The Forum's reasoning was that if any negative impact could be minimal or out-weighed by any potential positives, then it might be considered worthwhile to risk extending the qualifying period.

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The Forum has reviewed the following factors in considering whether a longer qualifying period could have any positive impact, whether long-term or short-term, and whether a longer qualifying period could have a negative impact, or contribute to any particular damage or disadvantage.

Potential positives

1. Employers might be more likely to take on new staff rather than, for example, increasing overtime for existing staff.

2. Employers might be more willing to employ staff via back to work/advance to work type schemes and/or young people with little work experience.

3. Employers might be more likely to take a risk in employing new staff via initiatives such as the employment grant scheme which gives an incentive payment to an employer who provides 12 months' permanent employment (or a fixed-term contract of at least 18 months) to locally qualified individuals who have been registered as actively seeking work for 12 months or more.

4. If the qualifying period was harmonised with other jurisdictions, it might be simpler for businesses that trade across two or three jurisdictions.

5. If the qualifying period was the same as, or longer than, other jurisdictions, Jersey might be more competitive as a place to start or grow a business.

6. Turnover of staff might be reduced if employers do not feel compelled to terminate employment prior to the 26 week qualifying period.

7. Even if employers terminated employment contracts prior to say, a one year qualifying period to avoid unfair dismissal complaints, employees would at least benefit from a greater period of work experience.

8. If jobs are created, it may be easier to get people off Income Support and in work for longer periods.

9. Employers might reduce the practice of employing staff via agencies instead of directly to avoid unfair dismissal claims which could increase the number of permanent rather than temporary jobs.

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10. Employers might be more likely to create new jobs on the basis that they would have one year, instead of 26 weeks, to decide if there is sufficient work to justify the extra manpower.

11. A longer qualifying period gives employers more time to assess whether they have the right person for the job, which could be beneficial for both parties. Having a sufficient period of time is particularly important where, for example, there are peaks and troughs of work, or where people are re-training to work in a new industry (e.g. hospitality initiative).

12. The number of unfair dismissal complaints submitted to the Tribunal in 2012 could have been;
    - 19 percent fewer if the qualifying period was increased to 1 year
    - 35 percent fewer if the qualifying period was increased to 2 years.

    The number of unfair dismissal cases dealt with by the Tribunal could have been;
    - 15 percent fewer if the qualifying period was increased to 1 year
    - 28 percent fewer if the qualifying period was increased to 2 years.

13. With a reduction in the number of tribunal complaints and hearings, employers could direct their financial and manpower resources to managing staff instead of dealing with potential Tribunal complaints and settlements.

14. A reduced number of Tribunal hearings dealing with unfair dismissal claims could bring a small cost saving to the States.

15. Information provided by the Social Security Department[8] allows the Forum to estimate that both a quarter of working men and a quarter of working women had less than one years' service. There is unlikely to be a disproportionate impact on women if the qualifying period is increased to one year.

[8] Information provided to the Forum by the Social Security Department was derived from the December 2012 employer contribution schedules. Length of service was estimated by counting each continuous month in which employees had received earnings from the same employer. The data provides an indication of length of service, but there are limitations to the data in terms of providing an accurate measure of continuous service.

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Potential negatives

1. There is no direct evidence of any of the potentially positive factors set out above.

2. A qualifying period of 26 weeks was agreed as appropriate to protect employees from unfair dismissal during times of full employment. Whilst the economic and employment situation has since changed significantly, it has been suggested that it appears contradictory to increase the qualifying period in a period of high unemployment and poor job stability.

3. If employers do not find the time to assess the capability of a new employee in the first 26 weeks of employment, they may also be unlikely to find the time in the second 26 week period.

4. Whilst turnover of staff might be reduced if employers do not feel compelled to terminate employment prior to the 26 week qualifying period, staff turnover patterns might just move to an 11 month cycle instead of a 5 month cycle.

5. A longer qualifying period results in a longer period of job insecurity for employees. This could have wider implications for individuals, for example, mortgage lending decisions may take job security into account.

6. Whilst some employees might benefit from 11 months' work experience instead of 5 months' work experience, it may be more beneficial for two people to each have the opportunity of 5 months' work experience.

7. Whilst employers might reduce the practice of employing staff via agencies, instead of directly, to avoid unfair dismissal claims, agency staff are employed by the agency so the total number of jobs would remain the same.

8. If the qualifying period is increased, employers are unlikely to support it being reduced again in the future, irrespective of the economic situation.

9. Seasonal and fixed-term contract employees are likely to be adversely affected in that many would have no protection for at least their first season and possibly for their second or third seasons with the same employer. The current provisions (including the 'two-thirds rule') were

intended to protect the high proportion of fixed-term contract and seasonal workers in Jersey

10. If the qualifying period was to be extended to one year and the two-thirds rule was removed, the use (and possible abuse) of fixed-term contracts of up to 50 weeks might become prevalent. However, if the two-thirds rule was retained, short fixed-term contract employees would have disproportionately greater protection than permanent employees.

11. JACS Annual Report for 2012 reports on the numbers of employees who complain of bullying and harassment (260 during 2012) and comments that, while bullying or harassment is not necessarily linked to discrimination, in many cases it appears to be linked to an employee's race, sex, age or disability. JACS has noted that those without the necessary qualifying period for protection against unfair dismissal feel particularly vulnerable and feel unable to raise any grievance until they have 26 weeks' service. Currently, the only remedy for employees who have suffered discrimination or harassment is a claim of constructive unfair dismissal. Increasing the qualifying period beyond 26 weeks could exacerbate this problem.

12. A longer qualifying period potentially makes it more expensive to dismiss an employee because length of continuous service potentially brings greater statutory and contractual rights.

13. Other employment protections, such as breach of contract, payment of wages, failure to provide a written statement, failure to comply with collective consultation obligations and the proposed new protection against race discrimination, do not require the employee to complete any qualifying period in order to make a complaint to the Tribunal.

14. A longer qualifying period for protection against unfair dismissal could lead to an increase in the number of complaints to the Tribunal on other grounds. Even if those claims turn out to be weak, an employer is put to the cost and time of defending the claim. Such claims might involve more complicated questions of fact and law, resulting in more complex and costly disputes. It is possible, therefore, that there would not be a significant reduction in the cost to an employer of defending complaints or the cost of tribunal hearings.

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15. According to the CIPD's May 2011 report on the Coalition Government's review of employment regulation; "The Economic Rights and Wrongs of Employment Regulation"[9], there is evidence that a longer qualifying period might have a negative impact on employment stability in the longer term. In response to the UK Government's decision to increase the qualifying period from one year to two years, the report stated that; *"Any positive impact on the rate of recruitment is likely to be limited until the economic recovery gains proper momentum and, over time, likely to be offset by a corresponding increase in the rate of dismissals. Regular reviews of evidence on the effects of employment protection legislation published by the OECD suggests that while less job protection encourages increased hiring during economic recoveries, it also results in increased firing during downturns. The overall effect is thus simply to make employment less stable over the economic cycle, with little significant impact one way or the other on structural rates of employment or unemployment."*

16. The CIPD report also stated that *"Increasing the qualifying period for obtaining unfair dismissal rights thus runs the risk of reinforcing a hire and fire culture in UK workplaces, which would be detrimental to fostering a culture of genuine engagement and trust between employers and their staff and potentially harmful to the long-term performance of the UK economy. As it is, a negative trade-off between hire and fire and engagement cultures would not only be observed in the form of diminished growth in workplace productivity but possibly also more limited wage flexibility in future recessions. It is arguable, for example, that had easier dismissal procedures been in place during the recession of 2008 and 2009 there would have been fewer wage freezes and a greater number of private sector job cuts, akin to what occurred in the early 1990s recession."*

17. Only two of the employers that responded to the Forum's consultation stated that they would potentially increase the number of staff that they employ if there was a longer qualifying period. A survey of more than 600 employers undertaken in the UK by Eversheds[10] revealed that employers were doubtful as to whether an increase in the qualifying period would give businesses more confidence to recruit. A survey of employers

[9] www.cipd.co.uk/binaries/5547_Work_Horizons.pdf
[10] 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

conducted by Pannone[11] 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 have previously.

18. According to the March 2013 Business Tendency Survey, the proportion of business in all sectors reporting a decline in business activity compared with three months previously was -23 percentage points greater than the proportion reporting an increase. Forty-four percent of all businesses reported 'no change' in business activity, 65 percent reported 'no change' in employment, and 66 percent reported 'no change' in future employment. A large proportion of businesses do not appear to anticipate a sufficient upturn in activity to justify taking on more staff.

19. Research undertaken by BIS in March 2013 aimed to explore employers' perceptions of employment regulation and the impact of employment regulation on business development[12]. In particular, the research found that employer perceptions did not reflect the real impact that regulation has on businesses. The report states that *"Evidence of a perception-reality gap was most apparent amongst small and micro employers that did not have any formal HR policies in place. When describing their practices for managing staff, they indicated that the affect of regulation was limited and yet they described regulation as burdensome because they were anxious about litigation. This is very similar to the findings of Peck et al (2012). They showed that the perception of regulation being burdensome was influenced by anxiety and the belief that regulation was overly complex, rather than by the actual legal obligations that employers had to meet."*

    The research included the following suggestions –

    - *"Reducing the regulatory obligations for small employers may not be effective in addressing anxiety amongst these employers as often they were unaware of all the rules relating to employment. Previous research has suggested that this may also reinforce the*

[11] www.hrmagazine.co.uk/hro/news/1019160/tribunal-revamp-won-t-boost-jobs-employers
[12] "Employment Regulation – Part A: Employer perceptions and the impact of employment regulation" (March 2013) www.gov.uk/government/uploads/system/uploads/attachment_data/file/128792/13-638-employer-perceptions-and-the-impact-of-employment-regulation.pdf

perception that regulation changes frequently, making it difficult to keep up to date. (Peck et al, 2012).

- *Employers tend to have an inflated idea of the risk of being taken to an industrial tribunal when dismissing staff. Work may be required to dispel 'high risk' myths in order to reduce the perception that all employment regulation is burdensome.*

- *Tribunal outcomes were perceived as unpredictable. Pre-tribunal compromise agreements can seem the safest option for employers that are anxious about having to pay a tribunal award.*

- *Small employers (who employed manual workers) sometimes treated disciplinary processes as a formality which they followed only when they had decided to dismiss the employee. As a result, employees may feel that they had not had sufficient opportunity to improve their performance, which may lead to disputes and litigation.*

- *Encouraging small and micro employers to consistently follow a formal process, particularly when dealing with poor performance, may help them to avoid disputes and feel more confident when dismissing employees. However, employers were concerned about the effort and expertise this required as well as the potentially damaging impact on the personal relationships with their employees.*

20. It appears that employers, particularly smaller businesses, have the impression that fairly dismissing employees is almost impossible. Extending the qualifying period potentially perpetuates the myth that fair dismissals cannot be achieved and does not necessarily avoid future unfair dismissal claims.

21. A recent review of the Employment Tribunal's decisions in 2012[13] identified that some employers are unaware of the requirements of the Employment Law and identified a need to increase employers' awareness of the need to provide fair warning of dismissal or redundancy. It appears

[13] www.statesassembly.gov.je/AssemblyReports/2013/R.028-2013.pdf

that more advice, support and guidance may be required by employers, rather than a longer period in which to avoid unfair dismissal complaints.

22. The Forum consulted on the 'Disciplinary and Grievance Practice and Procedures' code of practice earlier this year and a recommendation is being prepared in which the Forum intends to clarify and simplify disciplinary procedures for employers.

23. The UK's Trades Union Congress (TUC) responded strongly to the 2012 increase to the qualifying period in the UK. A press release stated; "*The government argues that watering down unfair dismissal rights will help to boost recruitment and help companies grow. However, 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 from two years to 12 months, more than 1,750,000 extra jobs have been created in the UK. This change in the law is also not a top priority for business. The Small Business Barometer commissioned by the Department for Business (BIS) and published in October 2011 asked 500 small and medium-sized businesses about their main obstacles to success. The biggest problem (cited by 45 per cent) was the state of the economy, while obtaining finance from the banks was the next biggest issue (12 per cent). After this came taxation, cash flow and competition. Just six per cent of small businesses listed regulation, or 'red tape', as their main barrier to growth.*"

24. Whilst there are likely to be many reasons for reduced consumer spending, the TUC has suggested that a longer qualifying period might contribute to this. "*Cutting back on protection against unfair dismissal will do nothing to boost the economy. If people are constantly in fear of losing their jobs it will lead to even less consumer spending, and losing your job is one of the worst things that can happen to anyone, especially when unemployment is so high.*"

25. The TUC had also noted that; "*Around 2.7 million workers across the UK could face an increased risk of losing their jobs when the government increases the qualifying period for protection from unfair dismissal from one year to two years…In addition, the increased qualifying period could have a detrimental impact on younger workers – already facing serious difficulties because of record levels of youth unemployment. Nearly two in*

three (61 per cent) of employees aged 24 and under have less than two years service with their current employer – compared to around a quarter (24 per cent) of employees aged 30 to 40 years and less than a fifth (17 per cent) of those aged 40 to 50 years.

Information provided by the Social Security Department allows us to estimate that around 12,000 employees in Jersey (25 percent) could be affected by a move to a one year qualifying period. We can also estimate that 58 percent of young people aged 24 and under have less than one years' service; compared to 21 percent of employees aged 25 or more. The potentially disproportionate impact on young people appears to be greater than in the UK; 80 percent of employees aged 24 and under in Jersey had less than two years' service compared to 61 percent of that age group in the UK.

26. If Jersey was to extend the qualifying period but maintain protection for those who already had 26 weeks' service prior to the law being amended (as the UK did in April last year), the impact would be reduced. However it is not yet clear whether an amendment made by Order would be able to achieve this, or whether a primary law amendment (which could take one year or more to achieve) would be required to make the necessary transitional provisions.

27. Whilst there is a two year qualifying period for protection against unfair dismissal in the UK, there is potentially a far greater award at stake; up to £70,000. The maximum unfair dismissal award for an employee in Jersey with less than one year's service is a maximum of 4 weeks' pay.

28. In the UK, there are more grounds on which an employee may claim unfair dismissal from day-one of employment. In certain instances, employees who would not normally be able to claim unfair dismissal because they have too little service with the employer or are beyond retirement age, can claim 'automatically' unfair dismissal. An extended qualifying period could lead to an increase in the number of complaints of automatically unfair dismissal, for example, for failure to provide terms of employment. In addition to the grounds listed on page 4 that apply in Jersey, there are a considerable number of additional grounds in the UK, which include;

- Pregnancy
- Childbirth
- Maternity, paternity and adoption leave
- Parental leave
- Time off for dependants
- Requests for flexible working
- Health and safety
- Jury service
- A public interest disclosure
- The assertion of a right as a part-time worker
- The assertion of a right as a fixed-term employee

SECTION 4 – RECOMMENDATION

A longer qualifying period for protection against unfair dismissal would appear to present little disadvantage to employers and so it is to be expected that many employers and their representatives will support, or at least will not oppose, a longer qualifying period.

Few responses were received from employees and their representatives. However, this has not created an imbalance in the Forum's consideration of the matter. The Forum reaches its recommendations not by being persuaded by the most forcefully expressed, insistent or recurring responses, but by taking a balanced approach to the evidence and information that is available from many sources.

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 current and expected levels of business activity and whether profits can sustain additional staff. Given the negative indications around business activity, profits, employment and future expectations (according to the March 2013 Business Tendency Survey), 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.

The UK and Northern Ireland governments have found that it has not been possible to establish the likely impact of extending the qualifying period or to establish a direct link between changes in the qualifying period, growth and

employment. Qualifying periods in other jurisdictions are based on and reflective of the commercial, economic and political climates of those jurisdictions. Changes to the qualifying period in the UK have generally been politically driven rather than evidence based.

A one-year qualifying period would potentially remove unfair dismissal rights from thousands of employees in Jersey, weakening already minimal employment protections. Calls from employers for the removal of 'red tape' must be considered in view of the OECD finding that the UK has one of the least regulated labour markets in the world. The UK has considerably more extensive employment and equalities legislation than Jersey.

Whilst the qualifying period is two years in the UK, up to £70,000 compensation is available for unfair dismissal. A shorter qualifying period is perhaps more appropriate given the restricted potential for compensation in Jersey. In addition, compared to the UK, the Employment Law provides far fewer grounds on which dismissal is automatically unfair from day one of employment. An employee who is dismissed because she is pregnant, for example, is currently only protected against unfair dismissal after 26 weeks' service. A longer qualifying period would exacerbate this unfairness until family friendly provisions are introduced.

Those who responded to the consultation tended to be in favour of a one year qualifying period. However, the respondents were mainly employers and employer representatives and the Forum's view was that there was no particular evidence or argument to support an extension to a one year qualifying period.

The Forum is not opposed, in principle, to a one year qualifying period. If there was currently no protection against unfair dismissal and the Forum was asked to recommend a qualifying period, one year might be considered as a reasonable starting point.

The Forum accepts that a longer qualifying period could encourage an employer to give an inexperienced or young employee a chance; that employers might prefer a longer period in which to determine if a person is suitable for a job; and that other jurisdictions have longer qualifying periods.

Some of the consultation responses have intimated that a longer qualifying period would give employers comfort in making recruitment decisions which might offset the other challenges that employers are currently facing. However,

the Forum believes that this is not a sound basis on which such a significant change could be recommended.

Some of the potential disadvantages of a longer qualifying period appear to contradict the stated intentions of increasing growth and employment. In addition, a number of the factors that would appear to support an extended qualifying period show compelling indications that there may be potential longer-term disadvantages. For example;

- The OECD reviews of evidence on the effects of employment protection legislation suggest that while less job protection encourages increased hiring during economic recoveries, it also results in increased firing during downturns. The overall effect is to make employment less stable with little significant impact on employment or unemployment rates.

- Extending the qualifying period potentially encourages the myth that a fair dismissal is almost impossible. The Forum considers that this is potentially damaging and that employer perception could be addressed – by directing efforts to encourage employers to dismiss fairly – rather than by increasing the qualifying period to make a dismissal 'fair' for longer.

- The recent review of the Employment Tribunal's decisions in 2012 noted that some smaller employers are failing to follow the basic principles and requirements of the Employment Law. As identified in the BIS publication *'Employer perceptions and the impact of employment regulation'*, a change to the qualifying period could increase uncertainty for those employers who already find it difficult to get the basics right.

- In theory, a one year qualifying period could encourage employers to increase opportunities for young people, however in reality, such a move could have a disproportionate impact on young people in Jersey.

The Forum has found no evidence that a longer qualifying period would have a positive impact on employment and job opportunities. The Forum considered whether the consultation revealed any other reasons that might support a longer qualifying period. The Forum has concluded that the potentially detrimental impact of a longer qualifying period outweighs the potentially positive factors to such an extent that the Forum cannot recommend a longer qualifying period. The Forum recommends by way of a majority decision that the qualifying period for protection against unfair dismissal should remain at 26 weeks.

RECOMMENDATION

Qualifying period for protection against unfair dismissal

This recommendation was prepared by the following members of the Forum;

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Malcolm Ferey – Deputy Chairman
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Carol Le Cocq
Jeralie Pallot
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RECOMMENDATION
Qualifying period for protection against unfair dismissal

APPENDIX 1 – CONSULTATION QUESTIONS

The Forum stated in the consultation paper that respondents might wish to consider and respond to the following questions in formulating a response to the consultation. The consultation paper also stated that that Forum would particularly value any evidence to support any comments 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?

RECOMMENDATION

Qualifying period for protection against unfair dismissal

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.

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?

RECOMMENDATION
Qualifying period for protection against unfair dismissal

APPENDIX 2 – OVERVIEW OF CONSULTATION RESPONSES

1. **Comments supporting a longer qualifying period as likely to create employment**

"By extending the qualifying period we would be more likely to employ temporary or fixed term contacts in areas we currently make do with the staffing numbers and pay overtime/additional hours, therefore increasing our headcount and creating more jobs for locals." (Anonymous employer)

"The 'pressure' associated with new hires would potentially be reduced thereby making recruitment potentially more attractive than internal recruitment, agency workers or restructuring thereby assisting in a reduction of the current numbers of people out of work." (Martin Buckland, Senior Manager, Law At Work)

"We cannot say that we would definitely be employing more staff but we feel that as we win new business then we would be more likely to consider taking on additional employees in the knowledge that we have a longer period to evaluate their skills and the ongoing workload. This is particularly important in such a difficult economic climate where a business cannot risk significant future costs." (Anonymous employer)

"I most certainly support a proposal to increase the qualifying period. It will undoubtedly provide employers with some comfort when considering employing someone new." (Becky Hill, Director, HR Now Ltd)

"We would feel happier taking on someone who has been out of work for a long period of time etc. if we knew we had a trial period of a year. The employee would also get more of an opportunity to prove themselves." (Managing Director, ALX Training)

"I am aware of a small company that had temporary work which might have extended beyond the 26 week period. They were aware that they could use fixed term contracts etc but rather than risk an unfair dismissal claim (they did not have in house HR personnel) they used existing staff and required that they did overtime for the duration of the work being carried out. Had they not had the consideration of UD I believe they would have taken on an additional employee." (Managing Director, Clear Concepts)

RECOMMENDATION
Qualifying period for protection against unfair dismissal

"Chamber believes that Jersey should be the best place to start and grow a business, and that Government should remove any potential barriers to recruitment so that businesses have the incentive and ability to expand, ensuring maximum flexibility to promote competition without compromising fairness. Whilst the economic and business tendency outlook is negative, Chamber believes that any relaxation of government red tape (including employment regulations) can only be beneficial to the above aims. Chamber believes that extending the qualifying period for employees before they can bring a case to the Employment Tribunal for unfair dismissal may assist businesses feel more confident about hiring people and provide more time for employers and employees to resolve difficulties." (The Jersey Chamber of Commerce)

2. **Comments indicating that the current qualifying period is unlikely to be a barrier to job creation**

"In terms of recruiting additional staff the employment qualifying factor does not play a part on whether we recruit or not, we look purely at business needs and costs so the qualifying period has not been a barrier to employing more staff...The number of vacancies would not change depending on the outcome of this consultation." (Anonymous employer)

"For the majority of employers, it is difficult to understand why the need to dismiss fairly should be an impediment to employing staff. If an employee proves to be unsuited for a particular role (having presumably completed 26 weeks service satisfactorily) provided that the employer has pointed out their failings and given them the opportunity to improve (with guidance/training as needed), dismissal on the grounds of capability would be a fair dismissal if a capability/disciplinary meeting was used. Bearing in mind the costs associated with recruitment, it is unlikely that a reasonable employer would offer employment with an eye on dismissal...While we accept that there appears to be a genuinely held view by employers and their representative organisations that increasing the qualifying period (QP) to 12 or 24 months would stimulate employment, we can see no evidence that supports this view." (JACS)

"Employers are unlikely to (and should not) consider the inability unfairly to dismiss their staff before a certain timeframe as an incentive to take them on in the first place." (Anonymous employee)

"It is recognised, however, that it is likely to be in the commercial interests of employers to seek to lengthen the Qualifying Period, although there is potentially

a perverseness in the suggestion that liberating employers to terminate more junior or recently recruited members of staff will result in a net increase in employment levels in the Island." (Employment Lawyers Association (Jersey Branch))

"Whilst much is made of the apparent barrier to recruitment created by the current qualifying period, we have seen little evidence of this in practice...Employees benefit from a number of protections relating to their employment and can present a wide range of claims both to the Jersey Employment Tribunal and the Royal Court. A large proportion of those claims (e.g. breach of contract, personal injury, failure to provide a written statement, failure to comply with collective consultation obligations) do not require the employee to complete any qualifying period; the right exists from the first day of employment...There does not appear to be any indication from employers or employer representative groups that such other claims constitute a barrier to recruitment despite the fact that they attract no qualifying period. Accordingly, we struggle to see why an even longer period is required in respect of unfair dismissal protection... If the needs of the business necessitate a greater number of employees it would not make good business sense to avoid recruitment purely because of a potential risk of future unfair dismissal proceedings. If employees are regarded as good employees there will be no need to dismiss them; if an employer wishes to dismiss an employee it can do so in accordance with the remits of the legislation." (Anonymous law firm)

"At the time of the Employment Forum's consultation in 2001, Jersey had a very mobile workforce and full employment. It was against that backdrop that the 26 week qualifying period was agreed. Unfortunately, the economic and employment situation has changed significantly over the past decade and any change to the qualifying period must be viewed against the current environment. Protection from unfair dismissal is a necessary protection for employees. If, during times of full employment in 2001, it was considered appropriate to limit the unfair dismissal qualifying period to 26 weeks we struggle to see the reason why that period should be increased in a period of high unemployment and poor job stability. Of course, we can understand that an employer does not want to incur any unnecessary costs in dealing with unfair dismissal claims and/or paying awards in respect of such claims. However, the way to deal with that is by avoiding unfair dismissals in the first instance; not by arbitrarily increasing the qualifying period." (Anonymous law firm)

"Unite is totally opposed to the suggestion that the qualifying period for unfair dismissal claims be extended to two years. Unite also believes that were such a change to be made this would lead to additional claims under other jurisdictions being added where the qualifying period does not apply. This will therefore have the opposite effect of the one desired: what would have been a straightforward 1-day unfair dismissal claim turns into a 5-day discrimination claim, with all of the consequent effect on the resources of the ETs and the parties." (Unite response to UK 'Resolving Workplace Disputes Consultation' in 2011, submitted to the Forum's consultation by the Jersey branch of Unite)

3. **Comments supporting a longer qualifying period for other reasons**

Performance management / avoiding Tribunal complaints –

"Chamber believes that extending the qualifying period for employees before they can bring a case to the Employment Tribunal for unfair dismissal may assist businesses feel more confident about hiring people and provide more time for employers and employees to resolve difficulties." (The Jersey Chamber of Commerce)

"The current 26 week qualifying period is a factor when we are deciding whether to employ more staff. This is because the risk of a claim is, in our opinion, quite high if you fail to recognise or deal with performance issues within that time, therefore having to use resources to manage this quickly and effectively within a short time scale." (Anonymous employer)

"With the current 26 weeks qualifying period, this issue does not affect those who easily meet their probationary period standards, and nor does it affect those who within a short period demonstrate they are clearly unsuitable for further employment. The group who are at risk for the 26 week period are those who are marginal, with whom there is some doubt as to whether they are appropriate for the role or not. The current 26 weeks limit encourages their early dismissal and discourages their employer from giving them another chance." (Anonymous)

"At this moment in time, if an employee does not shine during a probationary period many employers decide to terminate employment before the 26 week qualifying period. If the qualifying period is extended we would hope this would encourage employers to spend more time with employees to ensure they meet business requirements." (The Jersey Chamber of Commerce)

RECOMMENDATION
Qualifying period for protection against unfair dismissal

"Employment legislation as a whole, and the risk of employment tribunal claims in particular, is likely to act as a potential deterrent for smaller businesses when it comes to recruiting staff…[a longer qualifying period] significantly reduces the risk of an employment tribunal claim. It provides a far better opportunity for an employer to assess the ability and suitability of new employees without the risk of a claim, should the employer find that a new employee does not have the required skills or otherwise does not fit in well and accordingly decide to terminate employment. The reduction in risk would make employers feel more confident about taking on employees." (Jersey Institute of Directors)

"If the period were longer then it would give employers a longer period to be able to assess whether the person and/or the post is appropriate. In a difficult climate this may encourage employers to continue the person or role for a longer period which is then more likely to lead to permanent employment." (Anonymous employer)

"I believe from experience that such employers are reluctant to take on extra staff when needed because of the employment law repercussions should their circumstances change and staff no longer be needed." (Dave Marsh)

"It prevents line managers from making substantive appointments. For example, where we might have a short term need for a piece of work to be undertaken we may be unsure how long it will take. Because of the limitations of giving fixed term contracts, the appointment would be placed through a temporary agency. This is less beneficial for the individual as there is no entitlement to the contractual terms and conditions that we would normally offer to our employees, but avoids claims for unfair dismissal. If the qualifying period was one year it would allow employers to have more flexibility." (States of Jersey Human Resources)

Employer perception –

"I hear time and time again fro sall employers and especially sole practitioners that they will not take on extra staff because of their fear of the Employment Legislation. Whilst it may well be the case that the fear is ill conceived there are enough stories within the business sector of employers who feel rightly or wrongly, the at Employment Legislation has resulted in significant distress, expense or at worse closure of a business." (Anonymous)

RECOMMENDATION
Qualifying period for protection against unfair dismissal

"For small businesses, it is quite important. Many are overwhelmed by the demands of the law and feel incapable of dealing with matters they are not confident in or knowledgeable about." (Managing Director, Clear Concepts)

"I believe that 26 weeks is usually long enough time to get to know a new employee and to see whether they "fit" right so from that point of view a 26 week limit is not a problem. However, I also believe that in these hard times it is very important to encourage businesses to take on new employees, yet so many of them are fearful of the financial cost to them of redundancy payments, and hence are frightened to take on more employees than absolutely necessary." (Anonymous)

Supporting employment schemes –

"We would feel happier taking on someone who has been out of work for a long period of time etc. if we knew we had a trial period of a year. The employee would also get more of an opportunity to prove themselves." (Managing Director, ALX Training)

"I feel that an extension of the qualifying period would also encourage employers so use the various back to work schemes more often as a large proportion of those on the schemes don't have proven backgrounds and are therefore a more risky recruitment options." (Anonymous HR professional)

Competitiveness –

"For us it would be great to be consistent across the Channel Islands and move this to one year." (Anonymous Employer)

"The huge amount of extra red tape, especially in employment law, over the last few years in Jersey has significantly put us off investing further in Jersey based operating companies. While we would look at Jersey domiciled companies, operating companies in Jersey has now become more onerous than in the UK, (their qualifying period was always 1 year twice as long as Jersey's and is now 2 years) which when combined with the fact the opportunity in the UK is much larger puts Jersey at a huge disadvantage when deciding where to invest and hence where job creation will take place." (Anonymous employer)

4. Comments relating to employers dismissing employees shortly before they would qualify for protection against unfair dismissal

"Sometimes employers decide to terminate a person's employment just before the 26 week period because they consider them not to be the appropriate person for the role or their organisation after all. It therefore appears that where the wrong person is in a job, the current time limit forces employers to make a decision sooner rather than later. If the period was longer than 26 weeks, it is likely that the wrong employee would remain in the job for longer and in the long run, would or could end up costing the employer more to terminate their employment." (Anonymous)

"If there is any doubt in our mind about the suitability of an employee as we head towards the 6mth threshold we would let them go rather than take on the risk." (Managing Director, ALX Training)

"As the Consultation recognises, so as not to risk a potential unfair dismissal complaint, employers may terminate an employee's employment shortly prior to the end of the 26 week period if they are not certain about an employee's suitability for a job. It is correct that such approach is often adopted by employers and does, in our experience, happen in practice. However, in our view, that in itself is not a sound basis on which to extend the qualifying period. If the qualifying period were to be increased, there is a likelihood that the practice of terminating employment shortly prior to the point at which unfair dismissal protection commences would continue. The only difference would be that employment would be terminated at 50 or so weeks (if the qualifying period were 12 months) rather than 24 or 25 weeks as happens currently. If the above practice were adopted, this, in turn, could lead to greater insecurity for employees who could find themselves unemployed after 50 weeks' employment because the employer does not want to take a risk beyond that date. Such approach could become a tactical tool by employers and lead to a more transient workforce. There is a possibility that this approach could disproportionately affect younger employees and/or more junior members of staff whose roles require less experience or expertise." (Anonymous law firm)

"One risk with a short qualifying period is that employers will not, or may not feel able to, give an employee time to settle into the business, their role and be trained accordingly. However, the question which this raises is why an employer cannot (or will not) take a risk on that employee improving after the 26 week period. This may be because many employers (particularly smaller businesses)

have the impression that fairly dismissing employees is almost impossible. Such perception is unfounded and, in our view, unfortunate. The main purpose of unfair dismissal protection is to ensure that employers act fairly in dismissing employees; it is not intended to make it impossible or difficult for employers to do so. It is essential that employers feel able to dismiss an employee fairly where there is a fair reason for doing so as provided by the Employment Law." (Anonymous law firm)

5. **Comments relating to a link between the qualifying period and volumes of Tribunal claims**

"The Employment Forum's research indicates that the volume of Tribunal claims which included unfair dismissal for employees with 26-51 weeks' service amounted to 15% of the 81 recorded claims settled by the Tribunal. This percentage increased to 28% for employees with 26-103 weeks' service. However, it does not necessarily follow that increasing the QP to 12 or 24 months would reduce claim volumes by 15% or 28% respectively, as many claims are "multi-headed"; while unfair dismissal may not be claimed, holiday pay, rest days, public holidays, notice and auto-unfair etc may still be claimed." (JACS)

"Yes, there is a definite link. The qualifying period allows seasonal staff to make a claim to the tribunal whereas in Guernsey, for example, they have less claims at the tribunal as seasonal staff do not qualify. I am not saying that this is right or wrong but is a fact and since the employee 'has nothing to lose' they may as well lodge a claim and push their luck. This was more evident in the early days of the Tribunal and the hospitality industry raised the issue of vexatious claims by seasonal staff on a number of occasions. Jersey should be no different to other jurisdictions on this and should not get hung up on ensuring everyone has these rights, Guernsey and the UK have no problems with this." (Anonymous employer)

"In our view, extending the unfair dismissal qualifying period potentially perpetuates the myth that fair dismissals cannot be achieved and does not necessarily avoid future unfair dismissal claims. Whilst the statistics highlighted in the Consultation demonstrate that some claims are presented between 26 weeks and 12 months of employment, a large proportion arise after that time. In our experience in dealing with Jersey Employment Tribunal claims and terminations which are settled or resolved before Jersey Employment Tribunal proceedings are issued, a significant number of affected employees have in excess of 12 months' service." (Anonymous law firm)

"It is noted that only a small minority of cases recorded as having been heard by the Tribunal involved employees with a length of service of more than 26 week but less than one year. This reflects the experience of several of our members dealing with cases which do not reach the Tribunal. As a result, it is doubted that an extension of the current qualifying period for unfair dismissal claims (the "Qualifying Period") to one year will have any significant impact on the number of applications, or potential applications, before the Tribunal." (Employment Lawyers Association (Jersey Branch))

6. Comments in support of different qualifying periods

26 weeks –

"We do not believe the QP should be longer." (JACS)

"After some discussion, we concluded that we thought there was no strong reason for changing the unfair dismissal qualifying period from the current arrangements." (Staffside, Joint Executive for Civil Service Unions)

"In our view, a 12 month effective period leaves new employees in an uncertain position for an excessive period. Moreover, there is a danger that greater freedom allotted to employees may promote a less focused approach to recruitment and training so that even if it does encourage recruitment initially, it may be shorter term employment which is a poor substitute for stable, long term employment relationships." (Employment Lawyers Association (Jersey Branch))

"In our view and in our experience, the 26 week period offers a reasonable amount of time for an employer to determine if it has any significant concerns in respect of an employee and to take remedial action in that respect. We are concerned that extending the qualifying period will only act to delay the time at which dismissal to avoid unfair dismissal protection occurs rather than dealing with the underlying issues." (Anonymous law firm)

"The current 26 week period should not be extended for the following reasons:

- *Employees in Jersey do not currently have the same or comparable rights to employees in the UK and this will remain the case even when the discrimination law comes in and if/when the maternity/paternity/family leave rights are introduced in subsequent years' time. Accordingly, it would seem appropriate and/or fair to keep the qualifying period less in the island than in the UK;*

RECOMMENDATION

Qualifying period for protection against unfair dismissal

- *Awards by Tribunals in the UK are generally much higher than here as they have a different basis of compensating a successful employee and so it does not automatically follow that because the UK is extending its qualifying period that there needs to be an extension of it here because the processes or procedures are not like for like in many respects;*
- *The impact of lengthening the period needs to be considered in terms of seasonal jobs in the hospitality industry and agriculture in the island. If it meant that these employees have even less rights less currently then this would not be a good thing.*
- *Similarly, the impact on employees who are currently on fixed term contracts needs to be considered. Rather than offering an employee a permanent job, employers may simply offer longer fixed term contracts;*
- *In the current times of economic recession, it is not appropriate to lengthen the period. When someone loses their job on the mainland, they are generally able to look for work in several other towns or cities within a commutable distance. This is not the case when a employee loses their job in the island. Their options (unless employed in the finance industry) are far fewer and sometimes, they are forced to leave the island completely because alternative work cannot be found for them. This is much more of an upheaval and cost to the employee than just moving within the UK;*
- *As the Tribunal in Jersey has a cap of £10,000 for contractual claims, something which does not apply when an employee brings a claim in a Tribunal in the UK, employees are compensated to a lesser degree here. Where an employer offers to pay them just £10,000, employees often have to forgo the balance due to them as they cannot afford to purse a claim in the Royal Court, for the total amount of contractual sums owing to them. They are therefore currently in a less disadvantaged position to their counterparts in the UK;*
- *As it is proposed that there will also be a cap of £10,000 in discrimination cases, again which does not apply in Tribunals in the UK, employees in the island in these cases will not be in the same position as their counterparts in the UK when bringing claims, there is no automatic justification for the qualifying period for unfair dismissal in the island to be the same or similar to that in the UK;*
- *If it is subsequently decided that the qualifying period is to be extended, it should not be for more than one year. As the UK is such a large jurisdiction in comparison with far more statutory rights afforded to its employees, the length of the qualifying period in such a small employment market should be shorter."* (Anonymous)

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RECOMMENDATION

Qualifying period for protection against unfair dismissal

1 year –

"When employing young people especially, or people who are inexperienced in the position they have been employed in, it can take much longer than 26 weeks to determine whether they are suitable for the position. A one year qualifying period would be more beneficial to both employers and employees giving the employee a longer period in which to get to grips with the skills required." (Jersey Finance Limited)

"The UK has moved to two years but this may be a step too far for Jersey at present on the basis that we are currently on 26 weeks. We feel that one year would be sufficient to encourage employers to look more to the future and employ more staff. It would also provide a more appropriate timeframe to be able to more fully assess the fit of employees in their roles." (Anonymous employer)

"In total we have received 79 responses covering all industries. Of the 79 responses 10 believe that the 26 rules should remain the same...46 respondents felt that the 26 week qualifying period should be increased to one year and 23 felt is should be increased to two years." (CIPD Jersey Group)

"One year is considered to be a fair balance between the rights of employers and the rights of employees. It gives the employer a meaningful period in which to assess a new employee. In the first 5 months of joining a business a person is still learning the job. Where businesses are in doubt about whether or not a person is right for the job they will want to consider extending a probation period and at present there is a real risk if they extend probation to or beyond 6 months." (Jersey Institute of Directors)

2 years –

"With the current economic situation I would recommend a period of 2 years. This would have 2 benefits. Firstly, it will remove what is seen as a burden by employers but also remove a considerable amount of work from the Employment Tribunal enabling it to move to a time period between claim and hearing which is far more appropriate and professional." (Anonymous)

"We think we should be in line with the UK, where it is currently 2 years, however, if we managed to achieve a 1 year qualifying period, the same as Guernsey, this would then ensure we could apply consistency and fairness in our all HR practices across our pan island businesses." (Anonymous employer)

"If there is to be one qualifying period for all employers in Jersey, then that period should be long enough for those complex/highly skilled roles which require time for proper assessment (as discussed above). A period of 2 years therefore should apply, however, if such a period is deemed to be too long, the period should certainly not be less than 1 year." (Martin Buckland, Senior Manager, Law At Work)

Other qualifying periods –

"We suggest that a period of 15 months is considered. This is derived from a probation period of up to 3 months and then one years' employment. For many businesses a good 12 months is required to ensure that the employee is fully trained, committed and right for the business. Given holidays and potential sickness, the time for training and ensuring the business is still running, this period will allow proper assessment. This time scale as we understand it, would also tie in with the proposed maternity rights that no doubt will be brought forward as soon as discrimination is enacted." (The Jersey Chamber of Commerce)

"I agree with the former committee's views (quoted in the consultation paper) 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"."(Anonymous employee)

7. **Comments relating to groups of people who might be affected by a longer qualifying period**

"The protections afforded to employees in Jersey are already too weak compared to many other jurisdictions, and this would further erode employees' rights (the fact that there is a qualifying period in the first place renders many, including the young, more vulnerable)." (Anonymous employee)

"Unless special provision was to be made (such that seasonal employees enjoyed protection from unfair dismissal much earlier than permanent employees), an increase in the QP would adversely affect seasonal (FTC) employees in that many would have no such protection for at least their first season and possibly for their second/third season with the same employer, depending on whether the QP was extended to 12 or 24 months." (JACS)

"Yes, seasonal and fixed term contract workers are likely to be disproportionately affected if the qualifying period is extended. It is noted that this could

disproportionately affect workers of certain nationalities in the island, who tend to be most engaged in seasonal work. There is a view though that it would be fair to have the same qualifying period for everyone (including seasonal and fixed term contract workers). This would simplify things for businesses. Smaller and lower value businesses are likely to benefit significantly from such a change, which would be very positive in terms of encouraging business diversity in the island." (Jersey Institute of Directors)

8. Other relevant comments

"Automatic unfair dismissal provisions should be reviewed. For example, bearing in mind our comments in 9 above, we would like to see dismissal due to an employee raising a grievance included in the short list of auto unfair provisions." (JACS)

"As noted above, smaller and less well resourced businesses feel the most pressure from employment legislation. Arguably the best way of promoting fairer working practices would be to increase the JACS budget, to enable JACS to do even more work with such businesses." (Jersey Institute of Directors)

"More free or subsidised HR support for small businesses." (Tina Palmer, ASL Recruitment)

"Unite would suggest that possibly the government should invest more in ensuring that employers manage their employees better from day one thus preventing the likelihood of claims of unfair dismissal arising in the first place." (Unite response to UK 'Resolving Workplace Disputes Consultation' in 2011, submitted to the Forum's consultation by the Jersey branch of Unite)

"Alternative proposals for discouraging frivolous complaints to the tribunal would merit consideration. This might, in fact, offer greater encouragement for creating new jobs or employing new staff than extending the qualifying period for unfair dismissal." (Anonymous employee)

"We note that nothing is said in the consultation paper regarding the schedule of awards set out within the Employment (Awards) (Jersey) Order 2009 or how those awards are to be structured. It is accordingly presumed that if any decision is made to amend the Qualifying Period that the prescribed awards will not be changed, other than to remove those no longer applicable." (Employment Lawyers Association (Jersey Branch))

"While we accept that the costs of defending a claim are wider than the simple element of compensation, for many employers we believe it is the potential compensation that is the issue. If this is the case, consideration could be given to amending the compensation from 4 weeks' to 2 weeks' pay for those with between 26 weeks and 51 weeks service. In our view this would be a better alternative than increasing the qualifying period for unfair dismissal protection. We do not believe there is merit in making a change in the law that implies that an employer can dismiss unfairly for a longer period of time." (JACS)

9. Comments outside of the remit of the consultation

Some responses included issues that were outside the remit of the consultation which included comments relating to the following;

- Employment Tribunal; case precedent, appeals against decisions and awards for costs.
- Calls for a wider Employment Law review.
- Lack of compensation where an employer fails to provide written terms of employment.
- Suggestions relating to the provisions that aggregate fixed term contracts for the purpose of continuity of employment.