

STATES OF JERSEY



DRAFT EMPLOYMENT OF STATES OF JERSEY EMPLOYEES (AMENDMENT No. 6) (JERSEY) REGULATIONS 201-

**Lodged au Greffe on 17th January 2014
by the States Employment Board**

STATES GREFFE



Jersey

DRAFT EMPLOYMENT OF STATES OF JERSEY EMPLOYEES (AMENDMENT No. 6) (JERSEY) REGULATIONS 201-

REPORT

1. Provisions of the Employment of States of Jersey Employees (Jersey) Law 2005 stipulate the conditions under which public employees may stand for election as a Member of the States.
2. The Law stipulates that employees are either “eligible” to participate in political activities, including seeking election to the States Assembly, or “ineligible”. This depends on the nature of their posts. (For example, employees whose duties are essentially operational are generally deemed to be “eligible”, and employees whose duties are essentially strategic are generally deemed to be “ineligible”.)
3. The Law provides that a “politically eligible” employee should take leave of absence whilst campaigning to become a States Member (which will become unpaid if any outstanding annual leave or time off in lieu of approved overtime has run out), and that, if he/she is successful in being elected, he/she should no longer be a States employee from the day before he/she is sworn-in.
4. The Law also provides that, where a “politically eligible” employee fails to be elected to the States Assembly, and does not return to work on an agreed date without good reason, he/she will be deemed to have resigned with effect from 7 days after the election results are declared.
5. The Law also provides that, where a “politically ineligible” employee decides to stand for election to the States Assembly, he/she is required to resign from the date he/she is nominated as an election candidate or starts campaigning. In making this decision, the States were of the view that public employees who assist in the development of policy and strategy should not also be campaigning to become a States Member, and would therefore have to leave public employment.
6. Confusion had been experienced concerning the implementation of clauses which require “politically eligible” employees to resign their post if elected to the States or not returning to work, without good reason, on an agreed date in the event of failing to be elected. Clarification is also required where “politically ineligible” employees are required to resign once nominated as candidates for election. “Resignation” normally implies that notice will be

given and worked (or payment made in lieu), whereas the intention of the Law was that, in these circumstances, the contract of employment was to be terminated forthwith. In particular, nobody should be on the public employee payroll and be a States Member at the same time. Articles 37(6) and 41(2) of the Law do make the “resignation” automatic and immediate in the scenarios of the politically ineligible employee and the unsuccessful politically eligible employee; but those provisions do not expressly apply to the situation of the successful politically eligible employee covered by Article 37(1).

7. Hence, the States Employment Board (SEB) is proposing that the Law be amended by removing references to “resignation” and replacing them with references to “termination” in order to clarify that the question of notice or payment in lieu of notice cannot arise again in future. This will also apply expressly in all 3 scenarios described in the previous paragraph.
8. Further, the SEB is concerned that a “politically eligible” employee, who is successful in being elected to the States and whose contract is terminated when sworn-in as a States Member, might receive no salary between the day of his/her successful election and the swearing-in. Hence, the Board is proposing that the Law be further amended to grant such employees paid leave of absence from the day after the election until the day before the swearing-in.
9. Under current arrangements provided for in the Law, the “politically eligible” employee who is unsuccessful in being elected to the States remains on leave of absence (which will have become unpaid if any outstanding annual leave or time off in lieu of approved overtime has run out), but can return to work (and so be paid) at any agreed date during 4 weeks after the election results are announced. The effect of this is preserved in the amendments, to ensure this category of “politically eligible” employee also remains able to avoid losing pay after the election.
10. In conclusion, the SEB is asking the States to approve the draft amendments to the Law which would achieve the following –
 - (a) clarify that a “politically ineligible” employee’s contract of employment is terminated as soon as he/she is nominated to stand for election;
 - (b) ensure that a “politically eligible” employee who is successful in being elected to the States has his/her contract terminated on the day before being sworn-in as a States Member;
 - (c) clarify that a “politically eligible” employee who is unsuccessful in being elected to the States has his/her contract terminated without notice if they fail to return to work, without good reason, on the agreed date;
 - (d) grant to a “politically eligible” employee who succeeds in being elected, paid leave of absence from the day after the election until the day before swearing-in.

Financial and manpower implications

It is very difficult to estimate the financial and manpower implications of these draft Regulations, as this will depend on how many politically eligible States employees both stand for election to the States and are successful in being elected in the future. Any such implications are, however, expected to be extremely small indeed.

Explanatory Note

These Regulations amend the Employment of States of Jersey Employees (Jersey) Law 2005, to clarify the position where employment of politically eligible or ineligible States' employees is terminated in connection with elections. In this note "eligible employee" is used for a politically eligible States' employee, and "ineligible employee" for a politically ineligible States' employee.

The clarification is achieved principally by removing references to "resignation" where that takes place by operation of law, particularly in Articles 37 and 41, and replacing them with references to "termination". Resignation is normally by notice, leading to potential confusion in this context between the date on which notice is given and the date, normally later, on which employment terminates on expiry of a notice period. Resignation is also normally an intentional termination of the employment by the employee, whereas in these cases the termination is imposed by the Law whenever certain events occur. The cases are, and remain –

- (a) an eligible employee being elected (Article 37(1));
- (b) an eligible employee not returning to work after failing to be elected (Articles 37(2) and (5), which become Articles 37A(3), (5) and (6)); and
- (c) an ineligible employee starting to campaign for election (Article 41(1)).

Regulation 1 defines the Employment of States of Jersey Employees (Jersey) Law 2005 as the "principal Law".

Regulation 2 amends Article 36 of the principal Law, as a result of the changes to Articles 37 and 41. Article 36 will continue to require an eligible employee to take leave after being publicly nominated for election (these amendments do not affect Article 36(2A), under which this leave is unpaid unless accrued annual or other leave is used, subject to the new Article 37(1)(a) providing for conversion to paid leave). Articles 36(2)(a) and (b) will continue to set the point at which that leave ends, which is either when the employee returns to work after failing to be elected or when the employment terminates (which the current provision describes as resignation). The amendment's main effect is that a reference to resignation is replaced by an equivalent reference to termination. The amendment also replaces a cross-reference to Article 37(3), so that it refers instead to the new Article 37A(4) which replaces the current Article 37(3).

Regulation 3 substitutes new Articles 37 and 37A for the current Article 37 of the principal Law. The Articles continue to provide for the effect of the election result on an eligible employee, which continues to be that employment ends on the day before swearing in of a successful candidate, whereas an unsuccessful candidate can return to work or their employment will end. The division into 2 Articles clarifies the distinction between cases where the employee is or is not successful in the election. The overall effect of the amendments is to refer to termination of the employment, instead of using the current artificial concept of a deemed resignation, and so to avoid potential confusion about when the employment terminates (and what happens if the employment would otherwise end sooner).

The new Article 37 replaces the current Article 37(1), where the eligible employee is elected, to provide for paid leave and for termination of the employment.

The new Article 37(1)(a) provides that any unpaid leave granted under Article 36(2A) becomes paid leave from the day after the announcement of the election result.

In the current Article 37(1) there are 2 references to resignation, which might appear to refer to the point at which the employee gives notice (rather than the later point at which it takes effect). Instead the new Article 37(1)(b) clarifies that the employment terminates (automatically and with immediate effect) on the day before the person is sworn in to their newly elected office.

The new Article 37(2) clarifies the effect of the current Article 37(6) and ensures it applies to termination under Article 37(1)(b). The point is that the termination is really neither a resignation by the employee nor a dismissal by the employer (and so cannot be unfair dismissal or redundancy for the purpose of the Employment (Jersey) Law 2003). Instead it is a statutory result of the election, which overrides other statutory or contractual provisions, in particular those that require a notice period for termination, such as Articles 56(1) and (2) of the Employment (Jersey) Law 2003. The new Article 37(2)(b)(ii) replaces the current proviso in Article 37(1) “unless he or she has earlier resigned”, because that might appear to imply the employee can give notice of resignation before the swearing in, with the notice period running out after the swearing in, which would effectively prolong the employment and defeat the object of ensuring the person ceases to be an employee before they become a member. Instead the new Article 37(2)(b)(ii) clarifies the intention that the automatic termination (prior to swearing in) will only apply if the employment has not already terminated in any other way, and that no other action will prolong the employment beyond the day before the swearing in. These provisions apply to termination of employment of an eligible employee after a successful election. To improve consistency this same formula is then also applied to termination after an unsuccessful election attempt by an eligible employee (see new Article 37A(7) below), and to termination when an ineligible employee starts campaigning (see new Article 41(2) below).

The new Article 37A replaces the current Articles 37(2) to (8), where an eligible employee is not elected (see new Article 37A(1)). The effect of the current provisions, unaltered by these amendments, is that the unsuccessful eligible employee can follow a procedure to return to work, but otherwise their employment will terminate. Again references to resignation may cause confusion, and they have been replaced by references to termination.

The new Article 37A(2) defines relevant date (7 days after announcement of election results) and relevant Chief Officer, so that these do not have to be repeated.

The new Article 37A(3) pulls together the effects of the current Articles 37(2)(a) and (6)(a), recast as termination rather than resignation, where the employee positively notifies the Chief Officer of an intention not to return to work. The result is still that the employment terminates immediately that notification is given.

The new Articles 37A(4) and (6) deal with the case where the employee positively notifies the Chief Officer of an intention to return to work. They pull together the effects of the current Articles 37(2)(b), (3), (4), (7) and (8). The effect is still that the employee can return to work in the same post, but only if they agree a date with their Chief Officer (the date can still be any time within 4 weeks after election results are announced) and then do actually return on that date (subject to any reasonable excuse). As under the current Article 37(8), the States Employment Board can still terminate employment, despite the right to return to work, if the employee (while employed) has engaged in misconduct described in Article 34(3) (immoderate comment on States’

policies, personal attacks on States members, or political use of information only obtained through work).

The new Article 37A(5) pulls together the effects of the current Articles 37(5) and (6)(b), where the employee fails to indicate a choice either way within the 7 days allowed (or fails to return after choosing to do so), again recast as termination rather than resignation, and taking effect when the 7 days runs out.

The new Article 37A(7) ensures the termination in these cases is a statutory result (rather than either a resignation or a dismissal as such), which overrides other statutory or contractual provisions (particularly as to notice periods). It does so by applying the same principles as the new Article 37(2) (which clarifies the effect of the current Article 37(6), and is also applied by the new Article 41(3) for consistency).

Regulation 4 amends Article 39 of the principal Law (on political behaviour by ineligible employees) to refer to termination under Article 41, instead of resignation, to fit with the amendments to Article 41 (see below).

Regulation 5 similarly amends Article 40 of the principal Law to refer to termination under Article 41, instead of resignation, to fit with the amendments to Article 41 (see below).

Regulation 6 substitutes Article 41 of the principal Law. Article 41 continues to provide for the ending of the employment of an ineligible employee who starts to campaign (or is nominated). The main thrust of the amendment is to refer to termination of the employment, instead of using the current artificial concept of a deemed resignation, and so to avoid potential confusion about when the employment terminates. The employment still terminates without notice on the nomination or the start of campaigning (whichever happens first). But the amendment now links this back to the timing of the “relevant election period” in Article 39, instead of repeating the whole formula. The replacement paragraph (2) continues to ensure that the termination is immediate (without needing notice), but also ensures consistency with the equivalent provisions for other terminations (by applying the new Article 37(2), which also applies in the new Article 37A(7)).

Regulation 7 names the Regulations, and would bring them into force 7 days after they would be made.



Jersey

**DRAFT EMPLOYMENT OF STATES OF JERSEY
EMPLOYEES (AMENDMENT No. 6) (JERSEY)
REGULATIONS 201-**

Arrangement

Regulation

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Made [date to be inserted]

Coming into force [date to be inserted]

THE STATES, in pursuance of Article 42 of the Employment of States of Jersey Employees (Jersey) Law 2005¹, have made the following Regulations –

1 Interpretation

In these Regulations, “principal Law” means the Employment of States of Jersey Employees (Jersey) Law 2005².

2 Article 36 amended

In Article 36 of the principal Law –

- (a) in paragraph (2)(a) for the words “his or her resignation from employment” there are substituted the words “the termination of his or her employment”;
- (b) in paragraph (2)(b) for the words “Article 37(3)” there are substituted the words “Article 37A(4)”;
- (c) in paragraph (2A) after the words “granted unpaid special leave” there are inserted the words “(subject to Article 37(1)(a))”.

3 Article 37 substituted

For Article 37 of the principal Law, there are substituted the following Articles –

“37 Position of politically eligible States’ employee when elected

- (1) If a politically eligible States’ employee is elected Senator, Deputy or Connétable –

- (a) the employee shall be granted paid special leave for any part, falling after the day on which the announcement of the results of the election is made, of any period for which he or she would (but for the operation of this sub-paragraph) have been granted unpaid special leave under Article 36(2A); and
 - (b) the employee's employment as a States' employee shall terminate on the day before he or she is sworn in to that office.
- (2) Termination of employment under paragraph (1)(b) –
- (a) takes effect by operation of law, despite any other provision of any enactment or of the employee's contract of employment, including any requirement for notice; and
 - (b) for the avoidance of doubt, is not to be treated –
 - (i) as a dismissal for the purposes of the Employment (Jersey) Law 2003³, or
 - (ii) as operating to prevent any prior termination occurring otherwise than under that paragraph.

37A Position of politically eligible States' employee when not elected

- (1) This Article applies if a politically eligible States' employee is not elected to an office mentioned in Article 37(1), in an election for which he or she has been nominated as a candidate.
- (2) For the purpose of this Article –
 - (a) the relevant date is the seventh day after the day on which the announcement of the results of the election is made; and
 - (b) the relevant Chief Officer is the Chief Officer of the department or unit of administration in which the employee is employed.
- (3) If, before the relevant date, the employee notifies the relevant Chief Officer that he or she does not intend to return to work, his or her employment as a States' employee shall terminate immediately.
- (4) If paragraph (3) does not apply and, before the relevant date, the employee notifies the relevant Chief Officer that he or she intends to return to work, he or she shall be entitled (subject to Article 34(2)) to return to work –
 - (a) on a date, agreed with the relevant Chief Officer, that is within the period of 4 weeks after the day on which the announcement of the results of the election is made; and
 - (b) to the position that he or she held before giving notification under Article 36(1) of intention to stand.
- (5) If neither paragraph (3) nor (4) applies, the employee's employment as a States' employee shall terminate on the relevant date.

- (6) If paragraph (4) applies, but the employee fails without reasonable excuse to return to work on the agreed date, his or her employment as a States' employee shall be taken to have terminated on the relevant date.
- (7) Article 37(2) applies to termination of employment under this Article as it does to termination under that Article.”.

4 Article 39 amended

In Article 39(1) of the principal Law, for the words “before he or she shall be taken to have resigned under Article 41” there are substituted the words “before his or her employment shall be taken to have terminated under Article 41”.

5 Article 40 amended

In Articles 40(2) and (3) of the principal Law, for the words “until he or she shall be taken under Article 41 to have resigned” there are substituted the words “until his or her employment shall be taken to have terminated under Article 41”.

6 Article 41 substituted

For Article 41 of the principal Law, there is substituted the following Article –

“41 Employment terminates before politically ineligible States' employee campaigns or is nominated

- (1) On the day before the start of a relevant election period, as defined in Article 39(3), in relation to a politically ineligible States' employee, his or her employment as a States' employee shall be taken to have terminated.
- (2) Article 37(2) applies to termination of employment under this Article as it does to termination under that Article.”.

7 Citation and commencement

These Regulations may be cited as the Employment of States of Jersey Employees (Amendment No. 6) (Jersey) Regulations 201- and come into force 7 days after they are made.

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- ¹ *chapter 16.325*
² *chapter 16.325*
³ *chapter 05.255*