

STATES OF JERSEY



MAXIMUM EMPLOYMENT PROBATION PERIODS (P.103/2023): COMMENTS

Presented to the States on 12th January 2024
by the Minister for Social Security

STATES GREFFE

COMMENTS

The Minister urges Members to reject this Proposition and the amendment. Jersey Employment Law is designed to be straightforward and establish a clear balance of rights and responsibilities between employer and employee. These proposals add unnecessary complexity to the law and provide very limited, if any, additional protection, with no evidence of poor practice in this area.

Local employment law is an important part of the Jersey labour market and changes to it should be made only after very careful consideration and evidence of a clear need to prevent abusive behaviour by employers. With the present Proposition there is no such evidence in Jersey.

The Minister makes the following comments in respect of each aspect of the Proposition, as amended:

(a) set a maximum employment probation period of no more than 6 months

The Minister considers that there is no evidence that the lack of a maximum probationary period in Jersey law has harmed or disadvantaged employees who are or have been subject to a probationary period of employment. It is a generally accepted fact that, in Jersey, most employment contracts specify a probationary period of between three and six months, which the Deputy acknowledges himself in his Report.

The Minister is also aware that the imposition of a maximum probationary period could have implications for employment of a specialist nature. In the case of regulated financial services, for example, the risk to the employee is that they do not achieve the necessary competence within the six-month period to fulfil what may be a complex regulated role. In those circumstances the restriction of a six-month probation period would be detrimental to the employee's interests and leave an employer in the position of having to terminate the employment, in the absence of the ability to continue the probationary period to give an employee the best chance to demonstrate the necessary competence.

The same suite of Jersey employment rights applies to all employees, regardless of their contractual status – whether they be full- or part-time, trainees or probationers. It is not clear what additional employment protections would accrue to those employees subject to a maximum probationary period. In the case of claims for unfair dismissal, the 52-week period applies to all employees, probationers included. In the case of claims for automatic unfair dismissal, the law allows such claims to be made as a Day 1 right – in other words, without a qualifying period for employment. It is not the case that, by extensions to a probationary period, an employer could avoid either claims for unfair dismissal or the exercise of other employment rights.

To set a blanket requirement for a maximum probation period would, the Minister considers, be at odds with the need in Jersey for flexibility and proportionality in employment law matters.

In his Proposition, the Deputy refers to legislation in other jurisdictions, particularly the Republic of Ireland. The changes there were made specifically as a result of the requirement for EU Member States to transpose the provisions of an EU Directive on

transparent and predictable working conditions into their domestic legislation. These included the maximum duration of a probationary period.

The Deputy points to the fact that in Ireland the Regulations provide for a maximum period not exceeding 6 months for non-public sector employees and, for the public sector, 12 months.

Members should be aware that the Irish Regulations also go on to provide that, on an exceptional basis, the period for non-public sector employees may be longer – up to 12 months - and would need to be in the interests of the employee. There are reasons why it might be in the interests of the employee to take that into account when considering the probationary period.

Adopting elements of the law of another jurisdiction in isolation may lead to undesirable and unexpected results when those changes are implemented.

(b) ensure that any extension in an employment probation period can only be made once and does not result in the total probation period exceeding the maximum employment probation period set out in (a);

Given that most employment contracts in Jersey stipulate a probationary period of between three and six months, the Minister considers that, in most cases, it will not be necessary to extend the probationary period beyond six months and therefore employees will not suffer detriment, unfairness or disadvantage.

There may be many reasons why a probationary period would need to be extended, and the Deputy refers to several examples in his Report. In those circumstances the Minister considers that a ban on extending more than once would be unhelpful both to the employee and the employer and an artificial bar to the need for flexibility in the employment relationship.

The Minister also highlights the risk that a consequence of this part of the Proposition, should it succeed, is that employers may insert a single probationary period of six months into a contract of employment - and make any extension unnecessary - to the detriment of an employee who may be able to demonstrate the necessary skills in a shorter period. That detriment would be a prolonged period of uncertainty, meaning that an employee's prospects would only be confirmed at the latest stage of the probation period.

(c) permit the suspension of a probation period if an employee is absent from the workplace for one month or more for reasons not related to performance

The Minister considers that legislating for this particular provision is unnecessary and undesirable. The one-month figure is an arbitrary one and has the potential to be detrimental to an employee serving a probationary period whose change in personal circumstances – for example – means that they need time off work short of the one-month limit and may need further time off in due course. Employers and probationary employees need the flexibility to deal with individual circumstances.

The Proposition does not make it clear whether the 30-day period is an accumulated or a continuous one. If an accumulated one, is it right to assume that shorter, unconnected periods of time would count towards the overall 30-day limit and the suspension of the probationary period? The Minister is concerned that this would simply add to the uncertainty for the employee, to their detriment. The Minister considers that the Deputy's Report provides no evidence that suspending the probationary period would increase the employment protections currently in place.

The Minister also bears in mind that an employee who is dismissed during a probationary period or a suspended probationary period may have a claim for automatic unfair dismissal under the current provisions of the Employment and Discrimination Laws. The right to claim for automatic unfair dismissal is a Day 1 right in Jersey law and not subject to a qualifying period of service.

(d) ensure that any employee on a fixed term contract of 6 months or less will not be subject to a work probation period

The Minister considers that it is important that employees have the opportunity to demonstrate their aptitude for a particular job, regardless of the type of contract of employment on which they are engaged.

Part of demonstrating their aptitude is evidencing skills and whether the business suits the employee and the employee suits the business. This might be so where someone is employed on a fixed-term contract to provide specialist skills over a limited time period, perhaps where those skills are required in a particular health and safety context.

In those circumstances the Minister considers it essential that an employer has the time to judge fairly the aptitude of an employee even if, in the context of the overall length of contract, that time is a period of days or weeks.

The Minister considers a blanket ban on work probation for fixed-term contracts of six months or less would, in many cases, be counterproductive and undesirable. Such a ban may lead employers to reconsider the use of short-term contracts and have a detrimental effect on the fixed-term contract employment market, as well as having the potential to increase the use of zero hour contracts.

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

These comments were submitted to the States Greffe after noon, due to an unavoidable delay in the signing of the Ministerial Decision.
