
STATES OF JERSEY



INDEPENDENT EVALUATION OF ARTICLE 3 OF THE OFFICIAL ANALYST (JERSEY LAW)

Presented to the States on 13th September 2023
by the Chief Minister

STATES GREFFE

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Evaluation undertaken by Marbral Advisory

INTRODUCTION

Marbral Advisory has been contracted by the Government of Jersey to prepare an independent evaluation pursuant to Article 3(6) of the [Official Analyst \(Jersey\) Law 2022 \(jerseylaw.je\)](http://jerseylaw.je) (the “**2022 Law**”). For ease of reference, Article 3(6) provides as follows:

“(6) Within 6 months of the commencement of this Law, or before exercising the powers under this Article if earlier, the Minister must commission an independent evaluation of the procedure for dismissing the Official Analyst under this Article and present it to the States as soon as practicable after receiving it.”

Having received input from the Government on the policy background to the 2022 Law and the purpose of Article 3(6), this independent evaluation will focus on the appropriate procedure that should be adopted in the event that there may be, at any stage in the future, grounds for dismissing the Official Analyst (the “Analyst”).

METHODOLOGY

The Consultant was additionally provided with a brief by the Strategic Policy, Performance and Population Department “**to determine if the process set out in Article 3 of the Official Analyst (Jersey) Law 2022 is appropriate ... considering the States of Jersey Employees Law 2005, Employment (Jersey) Law 2003, and any wider employment law principles including any other jurisprudence and GoJ HR Policies**”. In order to undertake the brief the Consultant elected to consider the following

1. OFFICIAL ANALYST (JERSEY) LAW 2022
2. EMPLOYMENT OF STATES OF JERSEY EMPLOYEES (JERSEY) LAW 2005
3. STATES OF JERSEY (APPOINTMENTS PROCEDURES) (JERSEY) 2018
4. THE EMPLOYMENT (JERSEY) LAW 2003
5. JERSEY ADVISORY & CONCILIATION SERVICE CODE OF PRACTICE (disciplinary)
6. STATES OF JERSEY DISCIPLINARY POLICY (currently under review)
7. STATES OF JERSEY CAPABILITY POLICY
8. STATES OF JERSEY MANAGING ATTENDANCE POLICY

Disclaimer: Many of the above documents refer to States of Jersey, “The States”, “Chief Officers”. The implementation of this new law will be in a world of “Gov”, “Government” and “Director Generals” and Chief Officers “mark II”. Where necessary consider these terms in this report to be interchangeable.

OFFICIAL ANALYST (JERSEY) LAW 2022 (the “2022 Law”)

Employment status of the Official Analyst

It is noted that pursuant to Article 2(1)(a) of the [Employment of States of Jersey Employees \(Jersey\) Law 2005 \(jerseylaw.je\)](#) (the “2005 Law”), a person will be a “States’ employee” for the purposes of that Law if the person is “employed under a contract of employment made between the person and the States Employment Board”.

A person can be excluded from being a States’ employee pursuant to Article 2(4) of the 2005 Law if the person is the holder of an office specified in Schedule 1 to that Law, or is appointed by the Crown, a member of the States of Jersey Police or otherwise an officer of the Crown. The Analyst’s office is not specified in Schedule 1 and it is not a Crown appointment. There does not then appear to be anything in the 2005 Law to prevent the person appointed as the Analyst from being a States’ employee, provided they are employed under an employment contract with the States Employment Board (the “SEB”). It is understood that this reflects the policy intent of the Government at the time the 2022 Law was presented to and passed by the Assembly, which was to leave open the possibility for the person appointed as Analyst to be either a States employee or appointed on a different contractual basis.

Following from this, Article 2(1) to (4) of the 2022 Law states:

“2 Appointment of Official Analyst

- (1) *The Minister must appoint an officer as the Official Analyst for the discharging of the functions of the Official Analyst.*
- (2) *Before appointing an Official Analyst the Minister must consult and take into account the views of the Jersey Appointments Commission established under Article 17 of the 2005 Law.*
- (3) *Article 2 of the 2018 Law (which requires advance notice of the appointment to be given to the States) applies to the appointment of the Official Analyst.*
- (4) *The Official Analyst must hold and vacate office in accordance with the terms and conditions of the Official Analyst’s appointment.”*

For these purposes, the “Minister” is defined in Article 1 of the 2022 Law to mean the Chief Minister. Article 2 of the 2022 Law also leaves open the potential for the Analyst to either be appointed on terms that make them a States’ employee, or under a different contractual arrangement.

Whether a contract is properly characterised as an employment contract will affect the appointee’s rights on termination, including the extent of any rights the appointee may have under the [Employment \(Jersey\) Law 2003 \(jerseylaw.je\)](http://jerseylaw.je). However, it is not necessary to definitively determine the extent to which being, or not being, a States’ employee will affect an appointee’s rights in the report prepared for the purposes of Article 3(6) of the 2022 Law. In either case, there are risks for the Government if a person appointed as the Analyst is dismissed without following a robust procedure. In this regard, it is important to note that Article 3(3) of the 2022 Law requires that notice of the termination of the appointment be given to the States Assembly (as required under the States of Jersey (Appointment Procedures) (Jersey) Law 2018) and the Chief Minister will then be required to account to the Assembly for the reasons for making such a decision.

Relevance of the 2005 Law to the procedure for termination of the Analyst

There is a framework of powers, delegations and policies in place to govern the process for terminating the appointment of a States’ Employee under the 2005 Law.

Under Article 8(1)(a) of the 2005 Law, the SEB is the employer for States’ employees. Pursuant to Article 8(2)(b) of the 2005 Law, for the purposes of the discharge of its functions as employer, the SEB issues codes of practice concerning a number of matters. One of these SEB Codes (Employee Rights at Work) includes a line enshrining the right not to be unfairly dismissed. This “right” is governed in detail by the Employment (Jersey) Law 2003 and the comprehensive Code of Practice issued by JACS under Article 2A of that Law (see below).

Pursuant to Article 9 and 10 of the 2005 Law, the SEB has the power to do anything that is required to fulfil its functions as employer. The SEB also has the power to delegate its functions to the Chief Executive Officer. With the permission of the SEB, the Chief Executive Officer may delegate functions conferred on them to other persons. Article 10A of the 2005 Law provides that:

“10A Compliance with codes of practice concerning States’ employees^[15]

- (1) *The accountable officer in a States body (including a non-Ministerial States body) shall be accountable for ensuring that codes of practice issued under Article 8 are complied with in the recruitment and employment of States’ employees to work within that body.^[16]*

- (2) *Any person to whom a power or function is delegated under Article 10 shall, when exercising the power or discharging the function, comply with codes of practice issued under Article 8.*
- (3) *In this Article, “accountable officer”, “States body” and “non-Ministerial States body” have the same meanings as in the [Public Finances \(Jersey\) Law 2019](#).”*

In respect of most States employees, there is therefore a clear path under the 2005 Law to identify who is able to act on behalf of the SEB to terminate a States’ employee’s employment and the procedure to be followed under the relevant codes of practice. However, specific further provision is then made in respect of statutory offices:

“13 Statutory offices

*Nothing in this Law apart from Part 5 shall be taken to affect a power, if any, under an enactment of the States to appoint a person to an office or to terminate under such an enactment the appointment of a person to an office, **including but not limited to** an office specified in Schedule 1.” [My emphasis]*

Article 13 is applicable to the office of the Analyst because, notwithstanding that the office is not listed in Schedule 1 to the 2005 Law, it is a statutory office where there is express provision concerning the termination of a person’s appointment to that office (Article 3 of the 2022 Law). Therefore, even where the Analyst is appointed as a States’ employee, Articles 8 to 10A of the 2005 Law do not limit the power of the Chief Minister to terminate a person’s appointment.

Although the procedure for termination will not necessarily be mandated by the 2005 Law, this independent evaluation proposes that, it would be desirable and appropriate for procedures equivalent to those that would be applied under the 2005 Law to be adopted as a matter of practice in the context of any decision in respect of the termination of the appointment of the Official Analyst. The extent to which that is appropriate and the specific issues with the operation of those procedures is considered further below.

JACS CODE OF PRACTICE (CoP)

Jersey Advisory and Conciliation Service (JACS) were given Ministerial approval to introduce a CoP regarding disciplinary matters including dismissal under Article 2A of the 2003 Law. The 2005 Law effectively requires dismissals of States employees

to comply with the JACS CoP (unless Article 13 is applied). The JACS CoP must be taken into account by the Jersey Employment and Discrimination Tribunal.

SoJ DISCIPLINARY POLICY

1. S5.1 confirms that the policy applies to all States employees.
2. S6 identifies the roles and responsibilities of the parties engaged in the Procedure. Management is confirmed as being the individuals responsible for suspending, investigating and dismissing employees.
3. S10.2.4 reinforces that disciplinary hearing decision makers will be managers.
4. S11 clarifies that appeals must be heard by a more senior manager than the dismissing officer and in terms of dismissal the appeal must be heard by the Chief Executive Officer (CEO) or their nominee as identified in any Scheme of Delegation.

SOJ CAPABILITY POLICY

5. S5 confirms that the policy applies to all States employees.
6. S6.2 and 6.4 confirm that managers and the CEO are responsible for any decisions under this policy, including dismissal and implicitly, any appeal.
7. S7.4.5 explains that a capability hearing with the potential for dismissal must be chaired by a manager with no previous involvement in the case.
8. S7.5 states any appeal must be chaired by the CEO or a nominated manager

SOJ MANAGING ATTENDANCE POLICY

9. S5 and S6 mirror the language in the disciplinary and capability policies in respect of applicability to all employees and that managers which may include the CEO make any decisions relating to dismissal and appeals.
10. S8 reinforces the explicit role of line management in dismissals (and appeals).

STANDARD CONTRACT OF EMPLOYMENT (APPLICABLE TO THE OFFICE OF O.A)

The author has been provided with a standard, generic contract of employment for a States employee of an equivalent level to the Official Analyst. These observations assume that the Official Analyst is contracted on those or equivalent terms.

11. C1 of the standard contract establishes that the contract is between SEB and the employee.

12. C2 states “you, are employed...”.

13. C23 confirmed that the employee is subject to all policies and procedures and specifically references disciplinary and managing attendance policies as examples.

FINDINGS

The author advises that failure to adopt a robust and fair procedure in respect of any decision to dismiss the Analyst could entail risks of litigation, financial cost, reputational damage and adverse media and political scrutiny.

To avoid these risks, from the outset, it is important for decision making on disciplinary matters to be delegated to an appropriate senior official. The author understands that the Assistant CEO for People, Policy and Digital, Cabinet Office presently holds responsibility for overseeing the governance of the Office of the Official Analyst. In this capacity, and as a very senior official, it is appropriate that the Assistant CEO should hold general delegated authority for any matters pertaining to the professional and personal conduct of the Analyst, including responsibility for deciding whether to dismiss the Analyst.

In addition, it is important for there to be a right of appeal against decisions to take disciplinary action against the Analyst, including decisions taken to dismiss the Analyst. Although not a focus of this report, this would apply to other offices with a degree of independence from Government of Jersey (GoJ) (for example, the Chief Statistician and Children’s Commissioner roles), where governance for the office is overseen by a senior GoJ official. It would be appropriate for the CEO of GoJ to hold general delegated authority for considering all appeals against decisions made by senior officials to discipline or to dismiss independent office holders.

Firstly, this section of the report will consider the process for dismissing the Analyst in the event that they are employed by the SEB under a standard contract of employment.

Article 3(1) of the 2022 Law identifies that the Chief Minister “may dismiss the Official Analyst **only** if the Official Analyst -

- (a) is incapacitated by physical or mental illness;

- (b) has, without reasonable excuse, failed to discharge the functions of the Official Analyst;
- (c) has otherwise behaved in a way that is not compatible with the Official Analyst continuing in office; or
- (d) is otherwise unable or unfit to discharge the function of the Official Analyst.”

The above statutory grounds for dismissal are both very generic and wide ranging. However, from a HR and employment law (and best practice) perspective, the GoJ HR policies (all of which comply with in full, and frequently exceed the requirements of the Code of Practice established by the 2005 Law and the JACS Code of Practice) provide high quality procedures that could address all and any eventuality arising from the four grounds enshrined in the 2022 Law.

A dismissal under Article 3(1)(a) of the 2022 Law should, subject to the specifics of the case, be dealt with using the stages, officials and processes contained in the GoJ’s Managing Attendance Policy or Capability Policy.

In the case of health related frequent short-term absence or long-term absence, it would be appropriate to follow the Managing Attendance Policy. This, typically, would involve monitoring the appropriate data; taking advice from an expert Occupational Health (OH) Physician; consideration of any reasonable adjustments that could be made to assist in improving attendance; setting targets for improvement where necessary; and, if appropriate, issuing formal warnings. Ultimately, the process can lead to a final stage which would involve dismissal with notice. As noted above, the decision maker would be the chief officer with delegated responsibility, currently the Assistant CEO, with a right of appeal to the CEO.

In a similar fashion, if health issues were affecting performance of duties and responsibilities rather than simply attendance, then the Capability Policy would be deployed which includes similar stages (OH advice, ultimately dismissal and appeal) with the same decision makers engaged in the process.

In both scenarios, decision makers would need to ensure that their decisions are made in compliance with the Discrimination (Jersey) Law 2013 as it relates to disability discrimination.

In the case of Article 3(1)(b) of the 2022 Law there are, again, two scenarios that would require application of the policy that was relevant to the circumstances. If, for example, the “failure to discharge the functions of the Official Analyst” was as a result of incompetence or poor performance then, once again, the Capability Policy would be applied as described above. If, however, the “failure to discharge” was caused by wilful neglect, insubordination, or reckless carelessness then the Disciplinary Policy would be applicable. As with the other policies mentioned above, this policy involves several stages which can involve warnings (after an appropriate investigation confirms that disciplinary action is necessary), dismissal and appeal. One key difference with the disciplinary route is that, in addition to the power to dismiss with notice in cases of repeated or serious misconduct, where it is found that

the matter meets the definition of gross misconduct then summary dismissal without notice is the normal outcome.

Article 3(1)(c) of the 2022 Law is more straightforward in that any scenario that meets the definition of that clause would almost certainly fall full square into the remit of the Disciplinary Policy.

Article 3(1)(d) of the 2022 Law is somewhat imprecise and, in reality, it would be the nature of the factor that created the “unable or unfit” situation that would define which policy would be deployed. If, for example, it was in any way related to conduct then the Disciplinary Policy would apply.

As described above, for each of the four factors under Article 3(1) of the 2022 Law, there would be a robust, legally compliant and effective process and procedure that could be used in any scenario.

In essence this procedure would be:

1. An event or situation arises that could warrant dismissal of the Analyst.
2. The Assistant CEO (or any other senior official with delegated authority for overseeing the governance of the Office of Official Analyst at the time when the matter arises) would take advice from HR (and, if necessary, the Law Officers’ Department (LOD)) to determine which GoJ policy or policies may be applicable to the circumstances. They should apply the appropriate polices in the circumstances, as they would in the case of any States employee.
3. The Assistant CEO would establish any investigation that may be required.
4. In the event that formal action under any GoJ policy is recommended, the Assistant CEO would ensure that all stages of any such policy are executed in strict compliance with the relevant policy.
5. The GoJ CEO would have no involvement in any part of the procedure to date, ensuring that they are not compromised to carry out their delegated function to hear any appeal that may arise from the Assistant CEO’s decision.
6. Having exhausted the appeals process and a final decision having been made to dismiss the Analyst, the Assistant CEO would provide a report to the Chief Minister. This report should confirm that all necessary professional and legal advice had been procured and that all GoJ Policies, Codes of Practice and best practice had been followed in a robust, fair and diligent procedure.

The Chief Minister would be able to demonstrate to and report to the States Assembly that, notwithstanding that Article 13 of the 2005 Law does not require any specific procedure to be applied in dismissing the Analyst, they had exercised their power to dismiss the Analyst by requiring the appropriate senior GoJ officials to fairly and thoroughly apply a procedure that met all the requirements of the law, Codes of Practice and best practice.

Secondly, as noted above, the 2022 legislation does not preclude that the OA may be retained on a “contract for service” basis. This presumably would be under a commercial contract based on the published GoJ Standard Terms and Conditions.

The Standard Terms and Conditions could be made more specific/ stronger to recognise the specific conditions related to the “dismissal” of the OA as required by the 2022 OA law, especially those contained in Article 3(1). In particular it is recommended that the following changes be made to the Standard Terms.

The Standard Terms (on termination) should be expanded to refer to the 2022 OA law and to explicitly quote the four statutory reasons for dismissal in Article 3 as being grounds for termination of the commercial contract.

The Standard Terms (“Statutory and other legislation”) is sufficiently generic to imply that the 2022 OA law applies to the Contractor, however inserting for the avoidance of doubt a specific cross reference to the 2022 law would be desirable.

In these circumstances there is no employment relationship therefore this would not be a matter for SEB and there would be no requirement to deploy the SEB HR policies and procedures.

The Standard Terms provide for a notice period of one month period of notice. This section could be amended to include a notice period consistent with that which would be included in an employment contract and explicitly reserve the discretion to terminate without notice (as in an employment contract).

It may be necessary for the owner of the contract / commissioning team to adopt a process for terminating the OA commercial contract that reflects the rigour and decision making process used when dismissing the OA engaged under an employment contract. A suggested model would include-

1. An event or situation arises that could warrant termination of the commercial contract.
2. The departmental Chief Officer (or any other senior official with delegated authority for overseeing the governance of the Office of Official Analyst at the time when the matter arises) would take advice from the Group Director of Commercial Services (or Deputy) (and, if necessary, the Law Officers’ Department (LOD)) to determine the appropriateness of terminating the contract.
3. The departmental Chief Officer would establish any investigation that may be required.
4. In the event that formal actions under any Commercial Services policy in place at the time are necessary, the departmental Chief Officer would ensure that all stages of any such policy are executed in strict compliance with the contract and relevant policy before making any decision to terminate the contract.

5. The GoJ CEO would have no involvement in any part of the procedure to this point.

The departmental Chief Officer would provide a report to the Chief Minister. This report should confirm that all necessary professional and legal advice had been procured and that any prevailing Commercial Services policies, and best practice had been followed in a robust, fair and diligent procedure to affect the termination of the Commercial contract. In the highly unlikely event that the Commercial contract contained an appeal process clause appeal process then point 5 above could identify the CEO as having that responsibility.

RECOMMENDATIONS

1. That where the OA is an employee of the SEB or engaged under a contract for service, the Chief Minister delegates authority to investigate and determine grounds for dismissal (or termination of the commercial contract) of the OA afforded to them by the 2022 OA Law in the manner and using the procedures and officials described in this report.