

Regulations made under s.26.

**GIBRALTAR DEVELOPMENT CORPORATION
(EMPLOYER'S INSOLVENCY) REGULATIONS, 1991**

(LN. 1991/168)

22.8.1991

Amending enactments	Relevant current provisions	Commencement date
LN. 1991/195	r. 4(6)(b) and (9)	24.10.1991
1992/093	r.6(1)	9.7.1992
1993/027	r.10(2)	18.2.1993
1994/023	rr.2 and 6(1) and (2)	14.2.1994
1999/079	rr.6(1) and (2)	1.7.1999
1999/079	r.6	3.1.2000
2001/068	rr.6(1A), (1B) and (1C) and 7(1)(c)(iv)(dd)	7.6.2001
2004/135	r. 6(1)	3.1.2005
2007/054	r. 6(1)	1.4.2007
Act. 2007-17	r. 4(9)	14.6.2007
LN. 2008/039	r. 6(1)	1.7.2008
2013/008	rr. 2, 3(a), (b), (c)(i), (d), (e), (f), (g), (h), (i), 7A, 13A, 14(1A), (3A), 18, 19, 20 & Sch.	24.1.2013
2016/135	r. 2	23.6.2016
Act. 2016-20	rr. 2, 7(1)(c)(iv)(bb), 9(1)(b), 14, 15(1), (4)(a), 16	13.10.2016

Transposing:

Directive 2008/94/EC

EU Legislation/International Agreements involved:

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Title and commencement.

1. These Regulations may be cited as the Gibraltar Development Corporation (Employer's Insolvency) Regulations, 1991 and shall come into operation on the 22nd day of August, 1991.

Interpretation.

2. In these Regulations, unless the context otherwise requires,—

“Administrator” means the person appointed by the Government from time to time to carry out the administration of these Regulations;

“date of insolvency” means the date when, by virtue of regulation 3, the employer is deemed to be insolvent;

“Directive” means Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, as the same may be amended from time to time;

“employer” means any person—

- (a) required by the Business Trades and Professions (Registration) Act¹, 1989 to register under that Act; and
- (b) who or which has engaged one or more workers:

Provided that the Crown shall be deemed not to be an employer for the purposes of these Regulations;

“engagement” means the contractual relationship between any business trade or profession and a worker undertaking work of whatever nature for or on behalf of that business trade or profession, but shall not include the contractual relationship between agent and principal;

“Fund” means the fund established by the Gibraltar Development Corporation (Employer's Insolvency Fund) Rules, 1991;

“holiday pay” means—

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- (a) pay in respect of a holiday actually taken;
- (b) any accrued holiday pay which, under the worker's contract would in the ordinary course have been payable to him in respect of the period of a holiday if his engagement with his employer had continued until he became entitled to a holiday;

“Employment Tribunal” means the tribunal established under the powers conferred by section 12 of the Employment Act;

“inspector” means an inspector appointed under the powers conferred by regulation 4(2);

“Member State” means a Member State of the European Union;

“occupational pension scheme” means any scheme or arrangement which provides or is capable of providing, in relation to workers, benefits, in the form of pensions or otherwise, payable to or in respect of any such workers on the termination of their engagement or on their death or retirement;

“wages or salary” means—

- (a) in respect of a worker whose terms of engagement specify his contractual hours of work, the average weekly wages or salary contractually payable to that worker under the terms of his engagement for the contractual hours, excluding overtime, in respect of that engagement calculated over the period of thirteen weeks prior to the date of insolvency or the termination of the engagement, as the case may be;
- (b) in respect of a worker whose terms of engagement do not specify his contractual hours of work, the average weekly wages or salary paid to him by the employer in respect of the last thirteen weeks in which he was paid by that employer prior to the date of insolvency or the termination of the employment;

“worker” means an individual engaged by an employer under a contract to which the Employment Regulations, 1994 apply whether that contract is—

- (a) written or oral;
- (b) expressed or implied;

- (c) articles of apprenticeship or any other training scheme;
- (d) entered into—
 - (i) in Gibraltar for employment either wholly or in part in Gibraltar or elsewhere in the European Union; or
 - (ii) outside Gibraltar for employment in Gibraltar:

Provided that these Regulations shall not apply—

- (a) where the employer is a company, to an individual who is a director of that company;
- (b) to an individual of a kind specified in the Schedule.

Meaning of insolvency.

3. For the purposes of these Regulations, an employer shall be deemed to have become insolvent—

- (a) in the case of an individual, when he has been adjudged bankrupt or has made a composition or arrangement with his creditors;
- (b) in the case of a deceased individual, when an order has been made under section 101 of the Bankruptcy Act for the administration of his estate according to the law of bankruptcy;
- (c) in the case of a company registered in Gibraltar—
 - (i) when a winding up order has been made in respect of the company; or
 - (ii) when the company resolves by extraordinary resolution that it cannot by reason of its liabilities continue its business; or
 - (iii) when a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge;
- (d) in the case of a building society registered in Gibraltar when winding up order has been made in relation to that building society;

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- (e) in the case of a co-operative society, when a winding up order has been made under section 39 of the Co-operative Societies Act;
- (f) in the case of a society registered under the Friendly Societies Act¹, when an instrument of dissolution is made under section 68 of that Act or where the Registrar has made an award that the society be dissolved under section 73;
- (g) in the case of a partnership, whether limited or not, when any partner is deemed to be insolvent under the provisions of paragraph (a) or (b); or
- (h) in the case of a partnership, whether limited or unlimited, or an association or company which may be wound up by the court under Part VIII, when a winding up order has been made in respect of that partnership;

without having first discharged all liabilities towards workers.

Administration and inspection.

4. (1) The Administrator shall be responsible for the administration of these Regulations.

(2) The Administrator may appoint inspectors for the purposes of these Regulations.

(3) The Administrator or an inspector may require any employer whom he has reasonable cause to believe liable to contribute under these Regulations or the receiver or liquidator or other person engaged in administering the estate of such an employer who is deemed to have become insolvent, or the servant or agent of such person, to furnish such information and to produce all such books, documents and records, howsoever stored, as the Administrator or inspector may reasonably require for the purpose of ascertaining whether—

- (a) the employer is or was liable to make contributions under these Regulations;
- (b) all contributions which the employer was liable to make have been made;

¹ 1888-11

- (c) in the case of an employer deemed to have become insolvent—
 - (i) all workers to whom these Regulations apply have received in full—
 - (a) wages or salary;
 - (b) any other payments;
 - to which they are entitled under these Regulations;
 - (ii) all, if any, contributions to an occupational pension scheme to which the employer is contractually liable to his workers to contribute in the period of eighteen months ending with the date of insolvency, subject to a maximum contribution equivalent to contributions due in respect of eight weeks for each such worker, have been paid,

and may for this purpose interrogate alone or in the presence of witnesses, any such person:

Provided that no person shall be required under the provisions of this subregulation to give any information tending to incriminate himself.

(4) The Administrator or an inspector may, for the purpose of carrying out his duties under these Regulations,—

- (a) enter at all reasonable times any place, location or premises in Gibraltar in, at or from which—
 - (i) an employer is carrying on a business, trade or profession to which these Regulations apply;
 - (ii) the Administrator or an inspector has reason to believe such a business, trade or profession is being carried on;
 - (iii) the Administrator or an inspector has reason to believe he may obtain access to persons, books, documents or records, howsoever stored, falling within subregulation (3);
- (b) take extracts from or copy any books, documents or other records, howsoever stored, falling within subregulation (3).

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(5) On the occasion of any inspection visit, the Administrator or an inspector, as the case may be, shall notify the employer or his representative of his presence, unless the Administrator or the inspector considers that such a notification may be prejudicial to the performance of his duties.

(6) The Administrator or inspector shall—

(a) be prohibited from having any direct or indirect interest in any business, trade or profession which may be subject to inspection by him;

(b) not reveal—

(i) except for the purposes of enforcing any statutory or legal obligation, information;

(ii) at any time, even after ceasing to be an Inspector, any manufacturing or commercial secrets or working process,

which may come to his knowledge in the course of his duties.

(c) treat as absolutely confidential the source of any complaint bringing to his notice a failure or possible failure to comply with these Regulations;

(d) not in any case give intimation to the employer or his representative that a requirement to furnish information, books, documents or records or a visit of inspection was made as a consequence, direct or indirect, of the receipt of a complaint.

(7) An inspector appointed under these Regulations shall be furnished with the certificate of his appointment which he may be required to produce on applying for admission to any place, location or premises.

(8) A person shall not—

(a) omit truly to answer or reply or cause any other person to omit truly to answer or reply, to any question which the Administrator or an inspector is authorised to ask under these Regulations;

(b) fail to produce any document, book or other record, howsoever stored, which he is required by the Administrator or an inspector to produce;

- (c) directly or indirectly prevent any person from appearing before or being questioned by the Administrator or inspector;
- (d) in any other way prevent or seek to prevent the Administrator or an inspector from exercising his powers under these Regulations.

(9) Any person being employed in the administration of these Regulations—

- (a) shall, subject to the proviso to this subregulation, regard information obtained in the exercise of the powers contained in these Regulations as confidential;
- (b) shall not be required to produce in any court any document or to divulge or communicate to any court any matter or thing coming under his notice in the performance of his duties under these Regulations except as may be necessary for the purpose of carrying into effect the provisions of these Regulations or any Act or in order to institute a prosecution or in the course of a prosecution for any offence committed in relation to these Regulations or any Act:

Provided that nothing contained in this subregulation shall preclude a person employed in the administration of these Regulations, at the request of the Financial Secretary, providing to him such information relating to any matter referred to in this subregulation as the Government of Gibraltar may require for the purposes of formulating the economic and fiscal policies of the Government.

Costs of Administrator.

5. All expenditure incurred by the Administrator by way of payment of—

- (a) emoluments and fees (including, where appropriate pensions, allowances and gratuities) to officers, servants and agents engaged in—
 - (i) the administration or enforcement of;
 - (ii) inspection or investigation in connection with;
- (b) all expenses otherwise necessarily incurred in—

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- (i) the administration and enforcement of;
- (ii) inspection and investigation in connection with,

these Regulation shall be met from the Fund.

Contributions to the Fund.

6. (1) Every employer shall make a contribution at the relevant contribution rates in Schedule 1 to the Social Security (Insurance) Act as amended from time to time to the Fund in respect of a worker falling within these Regulations, commencing with the time in which he furnishes information in respect of that worker in accordance with regulation 11 of the Employment Regulations, 1994 and then in respect of every complete week during which the employment continues.

(1A) Notwithstanding subregulation (1) no levy shall be payable in respect of an employee for any week during the whole of which she is absent from work in exercise of her right to maternity leave under the Employment (Maternity and Health and Safety) Regulations, 1996.

(1B) Where, as respects any insurable employment, no services have been rendered by an insured person during any week, and no remuneration is paid wholly or partly in respect of any day in that week other than a day on which he either—

- (a) has been rendered incapable of work by reason of some specific disease or bodily or mental disablement and would but for the incapacity have been working; or
- (b) does not work in a normal week,

then, as respects that employment, no levy shall be payable in respect of the insured person for that week.

(1C) In this regulation “insured person” and “insurable employment” shall be construed in accordance with the provisions of the Social Security (Employment Injuries Insurance) Act², as amended from time to time.

(2) Contributions pursuant to subregulation (1) shall be paid together with the contributions payable in accordance with the Social Security (Employment Injuries Insurance) Act² by means of a single insurance stamp referred to in section 9 of that Act.

² 1952-10

Liability of the Fund for unpaid wages, etc.

7. (1) If an employer is deemed to have become insolvent—
- (a) any former worker whose engagement was terminated by the employer, otherwise than for misconduct within the period of seventy eight weeks immediately preceding the date of insolvency:
 - (b) any former worker who terminated his engagement with his employer within the period of seventy eight weeks immediately preceding the date of insolvency on account of the employer having broken the contractual terms of the engagement by his failure to pay wages or salary;
 - (c) any employee whose contract has not been terminated but who is owed—
 - (i) any wages or salary or any overtime in respect of a period ending with the termination of his engagement but not exceeding seventy eight weeks immediately preceding the date of insolvency;
 - (ii) any bonuses and commissions earned during that period;
 - (iii) any holiday pay that became payable during that period;
 - (iv) where the contract was terminated by the employer—
 - (aa) any amount payable in lieu of notice;
 - (bb) any amount awarded by the Employment Tribunal under section 70(3) of the Employment Act³ as compensation for unfair dismissal;
 - (cc) any amount payable by virtue of any determination of a joint industrial council registered under section 9 of the Employment Act³,
 - (dd) any redundancy pay in accordance with the provisions of an Order made under section 36 of the Employment Act³,

³ 1932-16

shall be entitled to be paid the amount so owing out of the Fund:

Provided that in respect of any payment made by virtue of subparagraphs (i) and (ii), the maximum amount payable shall be an amount equivalent to eight weeks of such wages, salary, overtime, bonus or commission, in the case of a bonus or commission calculated as an average of the amount of the bonus or commission paid in the last thirteen weeks in which it was paid.

(2) Any person who paid any fee or premium for articles of apprenticeship or any other training scheme for a worker of the employer deemed to have become insolvent, may be paid out of the Fund any reasonable sum by way of reimbursement of the whole or any part of that fee or premium.

Limitation of claims.

7A. For the purposes of calculating any sum due under regulation 7, a person's weekly wage, salary, overtime, bonus or commission shall be deemed not to exceed the sum of double the amount set out in the entry "Weekly Remuneration" in the Schedule to the Conditions of Employment (Standard Minimum Wage) Order 2001, as the same may be amended from time to time.

Liability of the Fund for contributions to pensions schemes.

- 8.(1) If an employer is deemed to have become insolvent and;
- (a) it was part of the terms of engagement of a worker that the employer would contribute to an occupational pension scheme; and
 - (b) the employer has, within the period of seventy eight weeks ending with the date of insolvency, and not previously, defaulted in payment of such contributions,

the Administrator shall at the request of the worker and provided that the interest of the worker in the scheme is otherwise valid and enforceable, pay out of the Fund into the pension scheme the amount of those unpaid contributions.

(2) The amount of any contributions paid by virtue of subregulation (1) shall be a debt provable in the bankruptcy or other insolvency proceedings of or against the employer.

Subrogation of rights.

9.(1) Where, under regulation 7, the Administrator makes any payment to a worker or former worker in respect of any debt to which that regulation applies—

- (a) any rights and remedies of the worker in respect of that debt, or, if the Administrator has only paid part of it, in respect of that part, shall, on the making of the payment become rights and remedies of the Administrator;
- (b) any decision of the Employment Tribunal requiring an employer to pay that debt to the worker shall have the effect that the debt or, as the case may be, that part of it which the Administrator has paid, is to be paid to the Administrator.

(2) There shall be included amongst the rights and remedies which become rights and remedies of the Administrator in accordance with subregulation (1), any right to be paid in priority to the other creditors of the employer in accordance with—

- (a) section 33 of the Bankruptcy Act⁴; or
- (b) section 241 of the Companies Act⁵,

and the Administrator shall be entitled to be so paid in priority to any other unsatisfied claim of the worker, and in computing for the purposes of either of those provisions any limit on the amount of the sums to be so paid, any sums paid to the Administrator shall be treated as if they had been paid to the worker.

(3) Where, under regulation 8, the Administrator makes any payment into an occupational pension scheme, any rights and remedies of the worker or of the managers of the scheme in respect of the contributions so paid shall, on the making of the payment, become rights and remedies of the Administrator.

(4) Any sums recovered by the Administrator in exercising any right or pursuing any remedy which is his by virtue of this regulation shall be paid into the Fund.

Application for payment.

⁴ 1934-13

⁵ 1930-07

10. (1) An application for payment of any amount under regulation 7 or to have any monies paid into an occupational pension scheme under regulation 8 shall be in writing, in such form, if any, as may be prescribed by the Administrator, and shall be made as soon as practicable and in any case not more than thirty days after the employee becomes aware of the insolvency of the employer:

Provided that the Administrator may, in his absolute discretion, extend the time for making an application, either before or after the expiration of such thirty days.

(2) A person who, for the purpose of procuring any payment under regulations 7 or 8, whether for himself or for some other person, knowingly or recklessly makes any false statement or representation or produces or causes or knowingly allows to be produced any document or information which is false in a material particular is guilty of an offence and is liable on summary conviction to a fine at level 3 on the standard scale and where the Administrator is of the opinion that an application contains such a statement or representation or includes such document or such information—

- (a) if the application has not been determined, the applicant shall forfeit any right to payment under regulations 7 or 8; or
- (b) if the application has been determined, the applicant shall refund to the fund any money received from the fund in respect of that application and any money not so refunded, shall be a debt due by the applicant to the Fund.

Enquiry as to insolvency.

11. On receipt of an application under regulation 10 the Administrator shall make such enquiry as he may consider necessary to satisfy himself—

- (a) that the employer is to be deemed to have become insolvent within the meaning of regulation 3;
- (b) that the sums claimed were payable; and
- (c) that such sums have not been paid by the employer.

Determination of applications.

12.(1) All applications made under these Regulations shall be determined by the Administrator:

Provided that any question of law arising in connection with such determination may, if the Administrator thinks fit, be referred for decision to the Supreme Court.

(2) The Administrator shall be entitled to appear and be heard on any reference made by virtue of subregulation (1).

Notices of subrogation.

13. Before making any payment in respect of an application made under regulation 10, the Administrator shall—

- (a) serve a notice on the employer, if he is in Gibraltar, or on his servant or agent, and also on the receiver or liquidator, if any, informing him—
 - (i) of the intention of the Administrator to make a payment—
 - (aa) to the worker;
 - (bb) into an occupational pension scheme,specifying the amount to be paid and the engagement for which and the period in respect of which the payment is to be made;
 - (ii) that the rights of the worker will, to the extent of the payment, be subrogated to the Administrator;
 - (iii) advising the employer to make no further payment to or for the benefit of the worker without the prior approval of the Administrator;
- (b) serve a notice on the worker, informing him—
 - (i) of the amount which the Administrator intends to pay him or to pay into an occupational pension scheme on his behalf, as the case may be, out of the Fund; and
 - (ii) that his rights will, to the extent of the payment, be subrogated to the Administrator.

Refusal of application.

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13A. The administrator may, in relation to an application by a worker, refuse the application—

- (a) where the Administrator considers it necessary to avoid an abuse by the applicant;
- (b) if it appears that payment would be unjustifiable because of the existence of special links between the worker and the employer and of common interests resulting in collusion between them;
- (c) in cases where the worker, on his own or together with his close relatives, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities.

Complaints to the Employment Tribunal.

14. (1) A worker who has made an application under regulation 10 and who is aggrieved by the decision of the Administrator thereon, or by the failure of the Administrator to communicate a decision to him, may present a complaint to the Employment Tribunal—

- (a) that the Administrator has failed to make any payment to the worker or into an occupational pension scheme, as the case may be; or
- (b) that the amount paid by the Administrator is less than the amount that should have been paid; or
- (c) that no decision has been communicated to him although more than three months have elapsed since the application was made.

(1A) A worker may also present a complaint to the Employment Tribunal where—

- (a) the Administrator has refused an application pursuant to regulation 13A; or
- (b) the Administrator has erred in determining that the worker falls outside the scope of these Regulations by virtue of regulation 18(b)

(2) A complaint under regulation (1) shall be presented—

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- (a) where the decision of the Administrator has been communicated to the worker, within three months of such communication or such further time as the Employment Tribunal may allow;
- (b) where no decision has been communicated to the worker, at any time not being less than three months nor more than six months after the date when the application was made.

(3) Where the Employment Tribunal finds that the worker is entitled to receive a payment from the Fund or to the benefit of a payment into an occupational pension scheme, or to a larger payment than the Administrator has determined, it shall make a declaration to that effect, specifying the amount to be paid and the period to which it relates.

(3A) Where the Employment Tribunal finds that the Administrator erred in holding that regulation 18(b) applied to that worker, the Employment Tribunal shall direct the Administrator to consider the application under regulation 18(a).

(4) The decision of the Employment Tribunal shall be communicated to the worker as soon as practicable.

Appeals to the Supreme Court.

15.(1) A person aggrieved by any declaration made by the Employment Tribunal under regulation 14 or by the dismissal by the Employment Tribunal of any complaint presented to it under that regulation may appeal to the Supreme Court on any question of law.

(2) An employer aggrieved by the decision of the Administrator that such employer is deemed to have become insolvent may appeal to the Supreme Court on any question of law.

(3) An appeal shall be in writing, in such form, if any, as may be prescribed, and shall be lodged within fourteen days of the date on which the decision against which the appeal is brought was communicated to the appellant, or such further time as the Court may, for sufficient reason, allow.

(4) On an appeal—

- (a) under subregulation (1), the Employment Tribunal shall be entitled to appear and be heard either by counsel or in the person of any member;

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- (b) under subregulation (2), the Administrator shall be entitled to appear and be heard, either by counsel or in person.

(5) On an appeal, the Supreme Court may give such directions and make such decisions as it may think proper, but not including directions as to the costs of the appeal.

Rules of Court.

16.(1) The Employment Tribunal Rules made under section 87 of the Employment and Training Act¹ shall govern the presentation, hearing and determination of complaints presented under regulation 14.

(2) The Employment Tribunal (Appeals) Rules made under section 88 of the Employment and Training Act shall apply to any appeal brought under regulation 15.

Offences.

17. A failure to comply with the provisions of these Regulations shall be a criminal offence punishable on summary conviction by a fine at level 3 on the standard scale.

Application of Regulations: transnational workers.

18. Where an undertaking carries out its activities in Gibraltar and in at least one Member State and is insolvent, any outstanding claims shall—

- (a) if the worker worked or habitually worked in Gibraltar, be dealt with in accordance with these Regulations; or
- (b) if the worker worked or habitually worked in a Member State, be dealt with in accordance with the law of that State.

Administrator to determine applications.

19. Where an application for payment is made under regulation 10, the Administrator shall—

- (a) determine whether the case falls within regulation 18(a), and if it does the Administrator shall consider the application in accordance with regulation 10; or

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- (b) determine whether the case falls within regulation 18(b), and if it does the Administrator shall refuse the application and notify the applicant of such refusal including the reasons therefor.

Information sharing.

20.(1) Where the Administrator receives an application from a worker to whom regulation 18 applies, the Administrator shall—

- (a) make such enquires as he considers necessary to satisfy himself of the matters in regulation 11(a) to (c), including making enquiries of the competent guarantee institutions in Member States; and
- (b) take into account the decisions taken in the context of insolvency proceedings in the relevant Member State when determining the employer's state of insolvency within the meaning of these Regulations.

(2) The Administrator may share relevant information with the competent administrative authority and any guarantee institution in a Member State concerned for the purposes of making it possible, in particular, to inform the guarantee institution responsible for meeting the workers' outstanding claims, and any restriction on disclosure imposed under these Regulations shall not apply to the extent that such disclosure is required by Article 10(1) of the Directive.

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SCHEDULE.

Regulation 2

**CLASSES OF WORKERS TO WHOM THE REGULATIONS DO NOT
APPLY.**

1. *Deleted*
2. The master and members of the crew of a fishing vessel who are remunerated by a share in the profits or gross earnings of the vessel (also known as "share-fishermen").
3. The spouse of the employer.