

C04/2012



Command Paper on a law to provide protection for
employees and other workers who disclose information in
the public interest.

**Presented to Parliament by the Minister with
responsibility for Employment**

**by Command of Her Majesty
JUNE 2012**

1. Draft Bill

2. Draft Explanatory Memorandum

DRAFT

BILL

FOR

AN ACT to provide protection for employees and other workers who disclose information in the public interest.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Act may be cited as the Employment (Public Interest Information) Act 2012 and comes into operation on the day appointed by the Government by notice in the Gazette.

Public Interest Information.

2. (1) After Part IV of the Employment Act, insert the following Part–

“Part IVA

Public Interest Disclosures

Interpretation of this Part

45A (1) In this Part–

"a protected disclosure" means a qualifying disclosure which is made by a worker in accordance with any of sections 45C to 45H,

"qualifying disclosure" has the meaning given by section 45B;

"the relevant failure", in relation to a qualifying disclosure, has the meaning given by section 45B(5).

(2) In determining for the purposes of this Part whether a person

makes a disclosure for purposes of personal gain, there shall be disregarded any reward payable by or under any enactment.

(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.

Disclosures qualifying for protection

45B (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following-

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in Gibraltar or elsewhere, and whether the law applying to it is that of the Gibraltar or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not

a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

Disclosure to employer or other responsible person

45C (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith-

- (a) to his employer, or
- (b) where the worker reasonably believes that the relevant failure relates solely or mainly to-
 - (i) the conduct of a person other than his employer, or
 - (ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

Disclosure to legal adviser

45D A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

Disclosure to a Minister

45E A qualifying disclosure is made in accordance with this section if-

- (a) the worker's employer is-
 - (i) an individual appointed under any Act by a Minister or the Government, or

- (ii) a body any of whose members are so appointed,
and
- (b) the disclosure is made in good faith to a Minister.

Disclosure to prescribed person

45F (1) A qualifying disclosure is made in accordance with this section if the worker-

- (a) makes the disclosure in good faith to a person prescribed by an order made by the Minister for the purposes of this section, and
- (b) reasonably believes-
 - (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
 - (ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

Disclosure in other cases

45G (1) A qualifying disclosure is made in accordance with this section if-

- (a) the worker makes the disclosure in good faith,
- (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
- (c) he does not make the disclosure for purposes of personal gain,
- (d) any of the conditions in subsection (2) is met, and

- (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
- (2) The conditions referred to in subsection (1)(d) are-
- (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 45F,
 - (b) that, in a case where no person is prescribed for the purposes of section 45F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
 - (c) that the worker has previously made a disclosure of substantially the same information-
 - (i) to his employer, or
 - (ii) in accordance with section 45F.
- (3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to-
- (a) the identity of the person to whom the disclosure is made,
 - (b) the seriousness of the relevant failure,
 - (c) whether the relevant failure is continuing or is likely to occur in the future,
 - (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
 - (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 45F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

- (f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

Disclosure of exceptionally serious failure

45H (1) A qualifying disclosure is made in accordance with this section if-

- (a) the worker makes the disclosure in good faith,
- (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
- (c) he does not make the disclosure for purposes of personal gain,
- (d) the relevant failure is of an exceptionally serious nature, and
- (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

Contractual duties of confidentiality

45J (1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) This section applies to any agreement between a worker and his employer (whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under

this Act or any proceedings for breach of contract.

Extension of meaning of "worker" etc for Part IVA

45K (1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 18(1) or an employee as defined in section 2 but who-

- (a) works or worked for a person in circumstances in which-
 - (i) he is or was introduced or supplied to do that work by a third person, and
 - (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,
- (b) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services in accordance with arrangements made by the Gibraltar Health Authority,
- (c) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than-
 - (i) under a contract of employment, or
 - (ii) by an educational establishment on a course run by that establishment;

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

- (2) For the purposes of this Part "employer" includes-
 - (a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,
 - (b) in relation to a worker falling within paragraph (b) of that

subsection, the authority or board referred to in that paragraph, and

- (c) in relation to a worker falling within paragraph (c) of that subsection, the person providing the work experience or training.

Application of this Part and related provisions to police

45L (1) For the purposes of-

- (a) this Part,
- (b) section 65C and the other provisions of Part VI so far as relating to the right not to be unfairly dismissed in a case where the dismissal is unfair by virtue of section 65C,

a person who holds, otherwise than under a contract of employment, the office of constable in the Royal Gibraltar Police shall be treated as an employee employed by the relevant officer under a contract of employment; and any reference to a worker being "employed" and to his "employer" shall be construed accordingly.

(2) In this section "the relevant officer" means the Commissioner of Police.

Rights under this Part

45M (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) This section does not apply where-

- (a) the worker is an employee, and
- (b) the detriment in question amounts to dismissal (within the meaning of section 64).

Complaints to the Industrial Tribunal

45N (1) An employee may present a complaint to the Industrial

Tribunal that he has been subjected to a detriment in contravention of section 45M.

(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(3) The Industrial Tribunal shall not consider a complaint under this section unless it is presented-

- (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)-

- (a) where an act extends over a period, the "date of the act" means the last day of that period, and
- (b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.

Remedies

45O (1) Where the Industrial Tribunal finds a complaint under section 45N well-founded, the tribunal-

- (a) shall make a declaration to that effect, and
- (b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure

to act to which the complaint relates.

(2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to-

- (a) the infringement to which the complaint relates, and
- (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

(3) The loss shall be taken to include-

- (a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and
- (b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.

(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law.

(5) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.”.

(3) After section 65C of the Employment Act, insert the following section-

“Protected disclosure

65D The dismissal of an employee by an employer shall be regarded for the purposes of sections 59 and 70 as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee made a protected disclosure as defined in section 45A.”.

EXPLANATORY MEMORANDUM

Draft

This Bill amends the Employment Act to make provision for the protection of workers who make a “qualifying disclosure” as defined in section 45B.