

**SECOND SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 2,799 of 22nd September, 1994.

LEGAL NOTICE No. 98 OF 1994.

EMPLOYMENT ORDINANCE.

**EMPLOYMENT ORDINANCE (AMENDMENT) REGULATIONS,
1994.**

In exercise of the powers conferred on him by section 86 of the Employment Ordinance, and of all other enabling powers, and in part for the purpose of transposing into the national law of Gibraltar Council Directives 92/56/EEC and 77/187/EEC, the Governor has made the following regulations-

Title, commencement and interpretation.

1.(1) These regulations may be cited as the Employment Ordinance (Amendment) Regulations 1994 and shall be deemed to have come into effect on the day specified for that purpose in each Part of these regulations.

(2) In these regulations references to "the Ordinance" are references to the Employment Ordinance.

PART I.

Amendment to section 61 of the Employment Ordinance.

2.(1) Section 61 of the Employment Ordinance is amended in sub-section (1) by-

- (a) inserting at the end of paragraph (a) the word "or";
- (b) omitting paragraph (b).

(2) This Part of these regulations shall have effect in respect of employment-

- (a) to which section 59 of the Ordinance applies and which is in existence at or after the date of these regulations, whether or not notice to terminate that employment has been given; or

- (b) where the effective date of termination has occurred at a date no earlier than 3 months from the date of these regulations; or
- (c) where at the date of these regulations a complaint has been made under section 70 of the Ordinance and the Industrial Tribunal has not determined that complaint.

PART II.

Amendment to heading.

3. The heading "Collective redundancies" appearing between sections 73 and 74 is amended by inserting after the word "redundancies" the words "and transfer of undertakings".

Amendment to section 2.

4. Section 2 of the Ordinance is amended in the definition of "employee" by inserting in paragraph (a) after the word "Ordinance" the words "except for the purposes of sections 74, 75, 76, 77 and 78".

Amendment to section 74.

5. Section 74 of the Ordinance is amended -

- (a) in sub-section (1) by inserting in the definition of "redundancies" after the word "concerned" the words "and for the purpose of calculating the number of redundancies provided for in sections 75 and 76, terminations of an employment contract which occur on the employer's initiative for one or more reasons not related to the individual employees concerned shall be assimilated to redundancies, provided that there are at least five redundancies";
- (b) by inserting after sub-section (2) the following new sub-sections -

"(3) For the purpose of any proceedings under sections 75, 76, 77 or 78, when an employee is dismissed or it is contemplated that he may be dismissed, it shall be presumed, unless the contrary is

proved, that he is dismissed or it is contemplated he may be dismissed as redundant.

(4) An employer shall have the obligations provided for in sections 75 and 76 whether the decision leading to the contemplated dismissal is that of the employer or that of a person controlling (directly or indirectly) the employer.

(5) Where no trade union is recognised by the employer in respect of employees of the description it is contemplated may be dismissed as redundant-

(a) the employer shall apply the provisions of sections 75 and 76-

(i) by substituting for references to trade union representatives references to employees of the description it is contemplated may be dismissed;

(ii) by substituting for the reference to five employees, 90 days and 60 days reference to the numbers of employees and the periods of time respectively specified in Council Directive 75/129/EEC as amended by Council Directive 92/56/EEC;

(b) there shall be inserted in section 76 provision for the power specified by Article 4.3 of Council Directive 75/129/EEC to be exercised by the Director."

Amendment to section 75.

6. Section 75 of the Ordinance is amended -

- (a) in sub-section (1) by omitting the words "proposing to dismiss as redundant within a period of 90 days" and substituting therefor the words "contemplating the dismissal as redundant within a period of 90 days or";

(b) in sub-section (2) by inserting after the word "effect" the words "and shall be undertaken by the employer with a view to reaching agreement with the trade union representatives";

(c) by omitting sub-section (3) and substituting therefor the following sub-section -

"(3) In determining for the purpose of sub-section (1) whether an employer is contemplating the dismissal as redundant of five or more employees within the period mentioned in that sub-section, no account shall be taken of employees whom he contemplates dismissing as redundant and in respect of whose contemplated dismissal consultation has already begun.";

(d) in sub-section (4) by inserting after the word "consequences" the words "by recourse, if appropriate, by the employer to opportunities for redeployment and retraining of employees made redundant, and for the purposes of such consultation, trade union representatives may seek the assistance of the Employment and Training Board, which will seek to provide information available to it in respect of courses and employment opportunities which the employer may be able to make available or assist to make available to any employee who it is contemplated may be dismissed as redundant";

(e) by omitting sub-section (5) and substituting therefor the following sub-section -

"(5) For the purposes of the consultation and to enable trade union representatives to make constructive proposals, the employer shall, at the commencement of the consultation, (or, where the information is not available to him at that time, as soon as the information becomes available) disclose in writing to trade union representatives all the relevant information and in any event shall set out in writing -

(a) the reasons for the contemplated dismissals;

(b) the numbers and description of employees whom it is contemplated may be dismissed as redundant;

(c) the numbers and description of employees and of workers normally employed by the employer;

(d) the period over which the contemplated redundancies are to be effected;

(e) the criteria proposed for the selection of the employees to be made redundant, due regard being had to any agreed procedure;

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed,

and a copy of the document containing at least the information listed in paragraphs (a) to (f) inclusive shall be provided to the Director on the day on which it is provided to the trade union representatives and shall be delivered to him at such address as may be prescribed from time to time for the purpose.";

(f) by omitting sub-section (7);

(g) in sub-section (8) -

(i) by omitting the expression "(2), (5) or (7)" and substituting therefor the expression "(2) or (5)";

(ii) by inserting after the word "circumstances" where it appears for the second time the words "and where the decision leading to the contemplated dismissal is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not

constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement".

Amendment to section 76.

7. Section 76 of the Ordinance is amended -

- (a) in sub-section (1) by omitting the words "proposing to dismiss within a period of 90 days" and substituting therefor the words "contemplating the dismissal within a period of 90 days of";
- (b) by omitting sub-section (2) and substituting therefor the following sub-section -

"(2) In determining for the purpose of sub-section (1) whether an employer is contemplating the dismissal as redundant of at least five employees within the period mentioned in that sub-section, no account shall be taken of employees whom he contemplates dismissing as redundant and in respect of whose contemplated dismissal notice has already been given to the Director.";

- (c) in sub-section (8) -

(i) by omitting the figure "(6)" and substituting therefor the figure "(7)";

(ii) by inserting after the word "circumstances" where it occurs for the second time, the words "and where the decision leading to the contemplated dismissals is that of a person controlling the employer (directly or indirectly), a failure on the part of that person to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with any of those requirements.".

New Sections 78A to 78K.

8. The Ordinance is amended by inserting after section 78 the following new sections-

"Effect of relevant transfer on contracts of employment, etc.

78A.(1) Except where objection is made under sub-section (5), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to sub-section (1), but subject to sub-section (5), on the completion of a relevant transfer-

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this section to the transferee; and

(b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee.

(3) Any reference in subsection (1) or (2) to a person employed in an undertaking or part of one transferred by a relevant transfer is a reference to a person so employed immediately before the transfer, including, where the transfer is effected by a series of two or more transactions, a person so employed immediately before any of those transactions or who would have been so employed had he not been unfairly dismissed in the circumstances described in Section 78D (1).

(4) Sub-section (2) shall not transferor otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

- (5) Sub-sections (1) and (2) shall not operate to transfer his contract of employment and the rights, powers, duties and liabilities under or in connection with it if the employee informs the transferor or the transferee that he objects to becoming employed by the transferee and where an employee so objects the transfer of the undertaking or part in which he is employed shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.
- (6) Sub-sections (1) and (5) are without prejudice to any right of an employee arising apart from this section and sections 78B to 78K to terminate his contract of employment without notice if a substantial change is made in his working conditions to his detriment, but no such right shall arise by reason only that, under that sub-section, the identity of his employer changes unless the employee shows that, in all the circumstances, the change is a significant change and is to his detriment.

Effect of relevant transfer on collective agreements.

78B. Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by section 78A(1), then-

(a) that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application as aforesaid, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee; and

(b) any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement.

Exclusion of occupational pensions schemes.

78C.(1) Sections 78A and 78B shall not apply-

(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme; or

(b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

(2) For the purposes of subsection (1) any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall be treated as not being part of the scheme.

Dismissal of employee because of relevant transfer.

78D.(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of this Part as unfairly dismissed if the transfer or a reason connected with it is the reason or principal reason for his dismissal.

(2) Where an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer is the reason or principal reason for dismissing an employee-

(a) subsection (1) shall not apply to his dismissal; but

(b) the dismissal shall for the purposes of section 65 be regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3) The provisions of this section apply whether or not the employee in question is employed in the undertaking or part of the undertaking transferred or to be transferred.

Effect of relevant transfer on trade union recognition.

- 78E.(1) This section applies where after a relevant transfer the undertaking or part of the undertaking transferred maintains an identity distinct from the remainder of the transferee's undertaking.
- (2) Where before such a transfer a trade union is recognised to any extent by the transferor in respect of employees of any description who in consequence of the transfer become employees of the transferee, then, after the transfer-
- (a) the union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and
 - (b) any agreement for recognition may be varied or rescinded accordingly.

Duty to inform and consult trade union representatives.

- 78F.(1) In this Section and Section 78G "an affected employee" means, in relation to a relevant transfer, any employee of the transferor or the transferee (whether or not employed in the undertaking or the part of the undertaking to be transferred) who may be affected by the transfer or may be affected by measures taken in connection with it, and references to the employer shall be construed accordingly.
- (2) Long enough before a relevant transfer to enable consultations to take place between the employer of any affected employees of a description in respect of which a trade union is recognised by him and that union's representatives, the employer shall inform those representatives of-
- (a) the fact that the relevant transfer is to take place, when, approximately, it is to take place and the reasons for it; and

(b) the legal, economic and social implications of the transfer for the affected employees and

(c) the measures which he envisages he will, in connection with the transfer, take in relation to those employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures which the transferee envisages he will in connection with the transfer, take in relation to such of those employees as, by virtue of Section 78A, become employees of the transferee after the transferor, if he envisages that no measure will be so taken, that fact.

(3) The transferor shall give the transferee such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of subsection (2)(d).

(4) The information which is to be given to the representatives of a trade union under this Section shall be delivered to them, or sent by post to an address notified by them to the employer, or sent by post to the union at the address of its head or main office in Gibraltar.

(5) Where an employer of any affected employees envisages that he will, in connection with the transfer, be taking measures in relation to any such employees of a description in respect of which a trade union is recognised by him, he shall enter into consultations with the representatives of that union with a view to seeking their agreement to measures to be taken.

(6) In the course of those consultations the employer shall –

(a) consider any representations made by the trade union representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(7) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty

imposed on him by any of the foregoing sub-sections, he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

Failure to inform or consult.

78G.(1) A complaint that an employer has failed to inform or consult a representative of a trade union in accordance with Section 78F may be presented to an industrial tribunal by that union.

(2) If on a complaint under subsection (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or what steps he took towards performing it, it shall be for him to show -

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) On any such complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of sub-section (2)(d) or, so far as relating thereto, sub-section (7) of Section 78F, he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with Section 78F(3) unless he gives the transferee notice of his intention to show that fact, and the giving of the notice shall make the transferee a party to the proceedings.

(4) Where the tribunal finds a complaint under subsection (1) well-founded it shall make a declaration to that effect and may-

(a) order the employer to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in sub-section (3) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(5) An employecc may present a complaint to an industrial tribunal on the ground that he is an employee of a description to which an order under subsection (4) relates and that the transferor or the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order.

(6) Where the tribunal finds a complaint under sub-section (5) well-founded it shall order the employer to pay the complainant the amount of compensation which it finds is due to him.

(7) An industrial tribunal shall consider a complaint under subsection (1) or (5) unless it is presented to the tribunal before the end of the period of three months beginning with -

(a) the date on which the relevant transfer is completed, in the case of a complaint under subsection (1);

(b) the date of the tribunal's order under subsection (4), in the case of a complaint under subsection (5);

or 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 the period of three months.

(8) In this section "appropriate compensation" means such sum not exceeding four weeks pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

(9) The Industrial Tribunal Rules made under section 12 of the Ordinance shall, as nearly as may be, govern the presentation,

hearing and determination of complaints presented under this section.

- (10) A person aggrieved by a determination made by the Industrial Tribunal under this section or by the dismissal by the Industrial Tribunal of a complaint made under this section, may appeal to the Supreme Court on any question of law.
- (11) An appeal under sub-section (10) shall be in writing, in such form as may be prescribed, if any, and shall be lodged within 14 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.
- (12) On an appeal, the Supreme Court may give such directions and may make such decisions as it may think proper not including directions as to the cost of the appeal.
- (13) The Industrial Tribunal (Appeals) Rules made under section 88 of the Ordinance shall, subject to the provisions of this section, apply as nearly as possible to any appeal brought under this section.

Contracting out.

78H. Any provision of any agreement (whether a contract of employment or not) shall be void in so far as it purports to exclude or limit the operation of sections 78A, 78D or 78F or to preclude any person from presenting a complaint to an industrial tribunal under section 78G.

A relevant transfer etc.

78J.(1) Subject to the provisions of sections 78A to 78H and this section, those sections apply-

(a) to a transfer from one person to another of an undertaking situated immediately before the transfer in Gibraltar or a part of one which is so situated; and

(b) whether the transfer is effected by sale or by some other disposition; and

(c) notwithstanding-

(i) that the transfer is governed or effected by the law of a country or territory outside Gibraltar;

(ii) that persons employed in the undertaking or part transferred ordinarily work outside Gibraltar;

(iii) that the employment of any of those persons is governed by any such law.

(2) It is hereby declared that a transfer of an undertaking or part of one -

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.

(3) In this section "creditors' voluntary winding up" and "wholly owned subsidiary" has the same meaning as in the Companies Ordinance.

(4) In sections 78A to 78H and this section-

"employee" means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly;

"relevant transfer" means a transfer to which sections 78A to 78H and this section apply and "transferor" and "transferee" shall be construed accordingly; and

"undertaking" includes any trade or business.

- (5) References in sections 78A to 78H and this section to the transfer of part of an undertaking are references to a transfer of a part which is being transferred as a business and, accordingly, do not include references to a transfer of a ship without more.
- (6) For the purpose of sections 78A to 78H and this section the representative of a trade union recognised by an employer is an official or other person authorised to carry on collective bargaining with that employer by that union.

Offences by bodies corporate.

- 78K.(1) When an offence in this Part which has been committed by a body corporate is shown to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate or any person who is purporting to act in such a capacity, he, as well as the body corporate, shall be guilty of that offence and be liable to be proceeded against accordingly.
- (2) Where the affairs of a body corporate are managed by its members, sub-section (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate."

Effective date in respect of Part II.

9. This Part of these regulations shall be deemed to have come into effect on the 24th day of June, 1994.

PART III.

Repeal of section 26A.

10. Section 26A of the Ordinance is repealed with effect from the date of these regulations.

Dated this 22nd day of September, 1994.

By Command,

GIBRALTAR GAZETTE, No. 2,799, Thursday 22nd September, 1994.

A. CARTER,
Deputy Governor.