

**SECOND SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3819 of 4 November, 2010

LEGAL NOTICE NO.158 OF 2010.

INTERPRETATION AND GENERAL CLAUSES ACT

EMPLOYMENT ACT (AMENDMENT) REGULATIONS 2010

In exercise of the powers conferred on it by section 23(g)(ii) of the Interpretation and General Clauses Act, and of all other enabling powers, and for the purpose of transposing into the law of Gibraltar Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, the Government has made the following Regulations—

Title and commencement.

1. These Regulations may be cited as the Employment Act (Amendment) Regulations 2010 and come into operation on the day of publication.

Amendments to the Employment Act.

2. The Employment Act (the Act) is amended in accordance with regulations 3 to 5.

Substitution of sections 74 to 78 of the Act.

3. The Act is amended by substituting the following Part for section 74 (including the subheading before it) and sections 75 to 78—

**“PART VIA
Collective redundancies**

Part VIA: Application and scope.

74.(1) This Part shall not apply to any—

- (a) redundancy effected by the Crown;

- (b) crew of any seagoing ship; or
 - (c) collective redundancy effected under a contract of employment for limited periods of time or for specific tasks except where such redundancy takes place prior to the date of expiry or the completion of the contract.
- (2) An employer shall have the obligations provided for in this Part whether the decision leading to the proposed dismissals is that of the employer or that of a person controlling, directly or indirectly, the employer.

Part VIA: Interpretation.

75.(1) For the purpose of this Part—

“employee” means a person who has entered into, or works under or, where the employment has ceased, worked under a contract of employment; and

“contract of employment” means a contract of service or apprenticeship, whether express or implied, and if it is express, whether oral or in writing.”.

(2) In this Part references to—

- (a) dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related;
- (b) representatives of a trade union, in relation to an employer, are to officials or other persons authorised by the trade union to carry on collective bargaining with the employer; and
- (c) affected employees are to employees who may be affected by the proposed dismissals or who may be affected by measures taken in connection with such dismissals.

(3) For the purposes of this Part—

- (a) if in any proceedings an employee is or is proposed to be dismissed it shall be presumed, unless the contrary is proved, that he is or is proposed to be dismissed as redundant; and
- (b) persons are employee representatives if—
 - (i) they have been elected by other employees for the specific purpose of being consulted by their employer about dismissals proposed by him, or
 - (ii) having been elected or appointed by the employees (whether before or after dismissals have been proposed by their employer) otherwise than for that specific purpose, it is appropriate (having regard to the purposes for which they were elected) for the employer to consult them about dismissals proposed by him,

and (in either case) they are employed by the employer at the time when they are elected or appointed.

Duty of employer to consult employee representatives.

- 76.(1) Where an employer is proposing to dismiss as redundant five or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.
- (2) The consultation shall begin at the earliest opportunity and in any event at least 60 days before the first of the dismissals takes effect.
 - (3) For the purposes of this section the appropriate representatives of any affected employees are—

- (a) if the employees are of a description in respect of which a trade union is recognised by their employer, representatives of the trade union; or
 - (b) in any other case, whichever of the following employee representatives the employer chooses—
 - (i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf;
 - (ii) employee representatives elected by the affected employees, for the purposes of this section, in an election satisfying the requirements of section 77(1).
- (4) The consultation—
- (a) shall include consultation about ways of—
 - (i) avoiding the dismissals;
 - (ii) reducing the numbers of employees to be dismissed; and
 - (iii) mitigating the consequences of the dismissals; and
 - (b) shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.
- (5) In determining how many employees an employer is proposing to dismiss as redundant no account shall be taken of employees in respect of whose proposed dismissals consultation has already begun.

- (6) For the purposes of the consultation the appropriate representatives may seek the assistance of the Ministry of Employment, 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.
- (7) For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives and to the Director—
 - (a) the reasons for his proposals;
 - (b) the number and description of employees whom it is proposed to dismiss as redundant;
 - (c) the total number of employees of any such description employed by the employer at the establishment in question;
 - (d) the proposed method of selecting the employees who may be dismissed;
 - (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect; and
 - (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.
- (8) The information referred to in subsection (7) shall be given by the employer to each of the appropriate representatives—
 - (a) at the time of the commencement of the consultation or, where the information is not available to the employer at that time, as soon as the information becomes available; and

- (b) by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office.
- (9) The employer shall allow the appropriate representatives access to the affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.
- (10) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection (2), (4) or (7), the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.
- (11) Where the decision leading to the proposed 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 such a requirement.
- (12) Where—
 - (a) the employer has invited any of the affected employees to elect employee representatives; and
 - (b) the invitation was issued long enough before the time when the consultation is required by subsection (2)(a) or (b) to begin to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

- (13) If, after the employer has invited affected employees to elect representatives, the affected employees fail to do so within a

reasonable time, he shall give to each affected employee the information set out in subsection (7).

- (14) This section does not confer any rights on a trade union, a representative or an employee except as provided by sections 77A to 77D.

Election of employee representatives.

77.(1) The requirements for the election of employee representatives under section 76(3)(b)(ii) are that—

- (a) the employer shall make such arrangements as are reasonably practical to ensure that the election is fair;
- (b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all the affected employees having regard to the number and classes of those employees;
- (c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
- (d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 76 to be completed;
- (e) the candidates for election as employee representatives are affected employees on the date of the election;
- (f) no affected employee is unreasonably excluded from standing for election;
- (g) all affected employees on the date of the election are entitled to vote for employee representatives;

- (h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;
- (i) the election is conducted so as to secure that—
 - (i) so far as is reasonably practicable, those voting do so in secret, and
 - (ii) the votes given at the election are accurately counted.
- (2) Where, after an election of employee representatives satisfying the requirements of subsection (1) has been held, one of those elected ceases to act as an employee representative and any of those employees are no longer represented, they shall elect another representative by an election satisfying the requirements of subsection (1)(a), (e), (f) and (i).

Application to the Industrial Tribunal and protective award.

77A.(1) Where an employer has failed to comply with a requirement of section 76 or section 77, an originating application may be presented to the secretary of the Industrial Tribunal on that ground—

- (a) in the case of a failure relating to the election of employee representatives, by any of the affected employees or by any of the employees who have been dismissed as redundant;
- (b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
- (c) in the case of failure relating to representatives of a trade union, by the trade union; and

- (d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant.
- (2) If, on an originating application under subsection (1), a question arises as to whether or not any employee representative was an appropriate representative for the purposes of section 76, it shall be for the employer to show that the employee representative had the authority to represent the affected employees.
- (3) On an originating application under subsection (1)(a) it shall be for the employer to show that the requirements in section 77 have been satisfied.
- (4) If the Industrial Tribunal finds the originating application well-founded it shall make a declaration to that effect and may also make a protective award.
- (5) A protective award is an award in respect of one or more descriptions of employees—
 - (a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant; and
 - (b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 76,

ordering the employer to pay remuneration for the protected period.
- (6) The protected period—
 - (a) begins with the date on which the first of the dismissals to which the originating application relates takes effect, or the date of the award, whichever is the earlier; and
 - (b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to

the seriousness of the employer's default in complying with any requirement of section 76,

but shall not exceed 90 days.

- (7) The Industrial Tribunal shall not consider an originating application under this section unless it is presented to it—
- (a) before the date on which the last of the dismissals to which the originating application relates takes effect;
 - (b) during the period of three months beginning with that date; or
 - (c) where the Industrial Tribunal is satisfied that it was not reasonably practicable for the originating application to be presented during the period of three months, within such further period as it considers reasonable.
- (8) If on an originating application under this section a question arises whether—
- (a) there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 76; or
 - (b) the employer took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances,

it is for the employer to show that there were such circumstances and that he did take such steps.

Entitlement under protective award.

77B.(1) Where the Industrial Tribunal has made a protective award, every employee of a description to which the award relates is entitled, subject to the following provisions and to section 77C, to be paid remuneration by his employer for the protected period.

- (2) The rate of remuneration payable is a week's pay for each week of the period; and remuneration in respect of a period less than one week shall be calculated by reducing proportionately the amount of a week's pay.
- (3) An employee is not entitled to remuneration under a protective award in respect of a period during which he is employed by the employer unless he would be entitled to be paid by the employer in respect of that period by virtue of—
 - (a) his contract of employment; or
 - (b) sections 55 to 57 or any other provision of law,if that period fell within the period of notice required to be given by section 54.
- (4) Regulation 28 of the Employment (Information and Consultation of Employees) Regulations 2005 shall apply for calculating the amount of a week's pay for any employee for the purposes of this section and, for the purposes of that calculation, the calculation date shall be—
 - (a) where a protective award has been made, the date of that award;
 - (b) if the employee was dismissed before that date, the date on which the employment was terminated.
- (5) If an employee of a description to which a protective award relates dies during the protected period, the award has effect in his case as if the protected period ended on his death.

Termination of employment during protected period.

- 77C.(1) Where the employee is employed by the employer during the protected period and he—
- (a) is fairly dismissed by his employer otherwise than as redundant; or
 - (b) unreasonably terminates the contract of employment,

then, subject to the provisions of this section, he is not entitled to remuneration under the protective award in respect of any period during which but for that dismissal or termination he would have been employed.

- (2) If an employer makes an employee an offer (whether in writing or not and whether before or after the ending of his employment under the previous contract) to renew his contract of employment, or to re-engage him under a new contract, so that the renewal or re-engagement would take effect before or during the protected period, and either—
 - (a) the provisions of the contract as renewed, or of the new contract, as to the capacity in which he would be employed, and as to the other terms and conditions of his employment, would not differ from the corresponding provisions of the previous contract; or
 - (b) the offer constitutes an offer of suitable employment in relation to the employee,

subsections (3) to (7) shall have effect.

- (3) If the employee unreasonably refuses the offer, he is not entitled to remuneration under the protective award in respect of a period during which but for that refusal he would have been employed.
- (4) If the employee's contract of employment is renewed, or he is re-engaged under a new contract of employment, in pursuance of such an offer as is referred to in subsection (2)(b), there shall be a trial period in relation to the contract as renewed, or the new contract (whether or not there has been a previous trial period under this section).
- (5) The trial period begins with the ending of his employment under the previous contract and ends with the expiration of the period of four weeks beginning with the date on which he starts work under the contract as renewed, or the new contract, or such longer period as may be agreed in accordance with

subsection (6) for the purpose of retraining the employee for employment under that contract.

- (6) Any such contract shall—
- (a) be made between the employer and the employee or his representative before the employee starts work under the contract as renewed or, as the case may be, the new contract;
 - (b) be in writing;
 - (c) specify the date of the end of the trial period; and
 - (d) specify the terms and conditions of employment which will apply in the employee's case after the end of that period.
- (7) If during the trial period—
- (a) the employee, for whatever reason, terminates the contract, or gives notice to terminate it and the contract is thereafter, in consequence, terminated; or
 - (b) the employer, for a reason connected with or arising out of the change to the renewed, or new, employment, terminates the contract, or gives notice to terminate it and the contract is thereafter, in consequence, terminated,

the employee remains entitled under the protective award unless, in a case falling within paragraph (a), he acted unreasonably in terminating or giving notice to terminate the contract.

Application by employee to the Industrial Tribunal.

77D.(1) An employee may present an originating application to the secretary of the Industrial Tribunal on the ground that he is an employee of a description to which a protective award relates and that his employer has failed, wholly or in part, to pay him remuneration under the award.

- (2) The Industrial Tribunal shall not entertain an originating application under this section unless it is presented to it—
 - (a) before the end of the period of three months beginning with the day (or, if the originating application relates to more than one day, the last of the days) in respect of which the originating application is made of failure to pay remuneration; or
 - (b) where the Industrial Tribunal is satisfied that it was not reasonably practicable for the originating application to be presented within the period of three months, within such further period as it may consider reasonable.
- (3) Where the Industrial Tribunal finds an originating application under this section well founded it shall order the employer to pay the complainant the amount of remuneration which it finds is due to him.
- (4) The remedy of an employee for infringement of his right to remuneration under a protective award is by way of originating application under this section, and not otherwise.

Duty of employer to notify Director of certain redundancies.

- 77E.(1) An employer proposing to dismiss as redundant five or more employees at one establishment within a period of 90 days or less shall notify the Director, in writing, of his proposal—
- (a) before giving notice to terminate an employee's contract of employment in respect of any of those dismissals; and
 - (b) at least 60 days before the first of those dismissals takes effect.
- (2) In determining how many employees an employer is proposing to dismiss as redundant within the period mentioned in subsection (1), no account shall be taken of employees in

respect of whose proposed dismissal notice has already been given to the Director.

- (3) A notice under this section shall—
 - (a) be given to the Director by delivery to him or by sending it by post to him, at such address as the Director may direct in relation to the establishment where the employees proposed to be dismissed are employed;
 - (b) where there are representatives to be consulted under section 76, identify them and state the date when consultation with them under that section began;
 - (c) contain the information referred to in section 76(7)(a) to (e); and
 - (d) be in such form and contain such particulars, in addition to those required by paragraphs (b) and (c), as the Director may direct.
- (4) After receiving a notice under this section from an employer the Director may by written notice require the employer to give him such further information as may be specified in the notice.
- (5) Where there are representatives to be consulted under section 76, the employer shall give to each of them a copy of any notice given under subsection (1) or (3) and of such further information that has been provided to the Director pursuant to subsection (4).
- (6) The copy of the notice and of the further information shall be delivered to the representatives or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the union at the address of its head or main office and the representatives may send any comments on the employer's notice to the Director.
- (7) An employer who has given notice under this section and who is also required to comply with the provisions of section 76

shall, as soon as reasonably practical, inform the Director in writing of the result of the consultations.

- (8) If in any case there are special circumstances rendering it not reasonably practicable for the employer to comply with any of the requirements of subsections (1) to (7), he shall take all such steps towards compliance with that requirement as are reasonably practicable in the circumstances.
- (9) Where the decision leading to the proposed 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.

Prohibition of contracting out against Part VIA.

77F. Any provision in an agreement, whether it be a contract of employment or not, is void in so far as it purports to exclude or limit the operation of any provision in this Part.

Offences.

78. An employer who fails to comply with any of the requirements of section 76 or 77E, commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.”.

Substitution of sections 78A to 78K of the Act.

4. The Act is amended by substituting the following Part for sections 78A to 78K—

**“PART VIB
Transfer of Undertakings**

Part VIB: Interpretation.

78A.(1) In this Part, unless the context otherwise requires—

“assigned” means assigned other than on a temporary basis;

“associated employer” means an employer who is associated with another employer and, for the purposes of this Act, any two employers shall be treated as associated if one is a company of which the other (directly or indirectly) has control, or both are companies of which a third person (directly or indirectly) has control;

“contract of employment” means any agreement between an employee and his employer determining the terms and conditions of his employment;

“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;

“recognised”, in relation to a trade union, means recognised to any extent by an employer, or two or more associated employers, for the purpose of collective bargaining;

“relevant transfer” means a transfer to which this Part applies and “transferor” and “transferee” shall be construed accordingly;

“trade union” shall have the meaning assigned to it by section 2 of Trade Union and Trade Disputes Act;

“undertaking” includes any trade or business.

- (2) For the purpose of this Part 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.
- (3) In this Part, references to “organised grouping of employees” shall include a single employee.

Application of this Part and a relevant transfer.

78B.(1) This Part applies to a transfer of an undertaking, business or part of an undertaking or business situated immediately

before the transfer in Gibraltar to another person where there is a transfer of an economic entity which retains its identity.

- (2) In this section “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
- (3) This Part shall not apply to seagoing ships.
- (4) Subject to subsection (1), this Part applies to –
 - (a) public and private undertakings engaged in economic activities whether or not they are operating for gain; and
 - (b) a transfer of an undertaking, business or part of an undertaking or business where persons employed in the undertaking, business or part transferred ordinarily work outside Gibraltar.
- (5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.
- (6) A relevant transfer–
 - (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.
- (7) In this section references to “contractor” include a sub-contractor.

Effect of relevant transfer on contracts of employment.

78C.(1) Except where objection is made under subsection (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which

would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

- (2) Without prejudice to subsection (1), but subject to subsection (6) and section 78M(9), 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) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
- (3) Any reference in subsection (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in section 78F(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.
- (4) Subject to section 78G, in respect of a contract of employment that is, or will be, transferred by subsection (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—
 - (a) the transfer itself; or
 - (b) a reason connected with the transfer that is not an economic, technical or organizational reason entailing changes in the workforce.

- (5) Subsection (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by subsection (1), from agreeing a variation of that contract if the sole or principal reason for the variation is—
 - (a) a reason connected with the transfer that is an economic, technical or organizational reason entailing changes in the workforce; or
 - (b) a reason unconnected with the transfer.
- (6) Subsection (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.
- (7) Subsections (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.
- (8) Subject to subsections (9) and (11), where an employee so objects, the relevant transfer 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.
- (9) Subject to section 78G, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under subsection (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.
- (10) No damages shall be payable by an employer as a result of a dismissal falling within subsection (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.
- (11) Subsections (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from this Part to terminate

his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

Effect of relevant transfer on collective agreements.

78D. 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 78C(1), then—

- (a) without prejudice to any enactment from time to time in force on collective agreements which are presumed to be unenforceable in specified circumstances, 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 in relation to the employee, 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.

Effect of relevant transfer on trade union recognition.

78E.(1) This section applies where after a relevant transfer the transferred organised grouping of resources or employees 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 trade 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.

Dismissal of employee because of relevant transfer

78F.(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 Act as unfairly dismissed if the sole or principal reason for his dismissal is—

- (a) the transfer itself; or
 - (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.
- (2) This subsection applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
- (3) Where subsection (2) applies—
- (a) subsection (1) shall not apply; 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.
- (4) The provisions of this section apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

Variations of contract where transferors are subject to relevant insolvency proceedings.

- 78G.(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings, this Part shall not prevent the transferor or transferee (or an insolvency practitioner) and appropriate representatives of assigned employees agreeing to permitted variations.
- (2) For the purposes of this section “appropriate representatives” are—
- (a) if the employees are of a description in respect of which a trade union is recognised by their employer, representatives of the trade union; or
 - (b) in any other case, whichever of the following employee representatives the employer chooses—
 - (i) employee representatives appointed or elected by the assigned employees (whether they make the appointment or election alone or with others) otherwise than for the purposes of this section, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to agree permitted variations to contracts of employment on their behalf;
 - (ii) employee representatives elected by assigned employees (whether they make the appointment or election alone or with others) for these particular purposes, in an election satisfying requirements identical to those contained in section 78L except those in section 78L(1)(d).
- (3) An individual may be an appropriate representative for the purposes of both this section and section 78K provided that where the representative is not a trade union representative he is either elected by or has authority from assigned employees (within the meaning of this section) and affected employees (as described in section 78K(1)).
- (4) Where assigned employees are represented by non-trade union representatives—

- (a) the agreement recording a permitted variation must be in writing and signed by each of the representatives who have made it or, where that is not reasonably practicable, by a duly authorised agent of that representative; and
 - (b) the employer must, before the agreement is made available for signature, provide all employees to whom it is intended to apply on the date on which it is to come into effect with copies of the text of the agreement and such guidance as those employees might reasonably require in order to understand it fully.
- (5) A permitted variation shall take effect as a term or condition of the assigned employee's contract of employment in place, where relevant, of any term or condition which it varies.

- (6) In this section—

“assigned employees” means those employees assigned to the organised grouping of resources or employees that are the subject of a relevant transfer;

“permitted variation” is a variation to the contract of employment of an assigned employee where—

- (a) the sole or principal reason for it is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce; and
- (b) it is designed to safeguard employment opportunities by ensuring the survival of the undertaking, business or part of the undertaking or business that is the subject of the relevant transfer;

“relevant insolvency proceedings” means insolvency proceedings which have been opened in relation to the transferor with a view to the liquidation of the

assets of the transferor and which are under the supervision of an insolvency practitioner.

Pensions.

78H.(1) Sections 78C and 78D 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 subsections (1) and (3), any provision of an occupational pension scheme which does not relate to benefits for old age, invalidity or survivors shall not be treated as being part of the scheme.
- (3) An employee whose contract of employment is transferred in the circumstances described in section 78C(1) shall not be entitled to bring a claim against the transferor for–
- (a) breach of contract; or
 - (b) constructive unfair dismissal,

arising out of a loss or reduction in his rights under an occupational pension scheme in consequence of the transfer, save insofar as the alleged breach of contract or dismissal (as the case may be) occurred prior to the date on which this Part took effect.

Notification of employee liability information.

78I.(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer–

- (a) in writing; or
 - (b) by making it available to him in a readily accessible form.
- (2) In this section and in section 78J “employee liability information” means—
- (a) the identity and age of the employee;
 - (b) the employee’s conditions of employment and those particulars of employment that an employer is obliged to keep in a register pursuant to section 79(1) or to produce to the Director pursuant to section 79(2);
 - (c) information of any disciplinary procedure taken against an employee within the previous two years;
 - (d) information of any court or tribunal case, claim or action—
 - (i) brought by an employee against the transferor, within the previous two years;
 - (ii) that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee’s employment with the transferor; and
 - (e) information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to section 78D(a).
- (3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.
- (4) The duty to provide employee liability information in subsection (1) shall include a duty to provide employee liability information of any person who would have been employed by the transferor and assigned to the organised

grouping of resources or employees that is the subject of a relevant transfer immediately before the transfer if he had not been dismissed in the circumstances described in section 78F(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

- (5) Following notification of the employee liability information in accordance with this section, the transferor shall notify the transferee in writing of any change in the employee liability information.
- (6) A notification under this section shall be given not less than fourteen days before the relevant transfer or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter.
- (7) A notification under this section may be given—
 - (a) in more than one instalment;
 - (b) indirectly, through a third party.

Remedy for failure to notify employee liability information.

- 78J.(1) On or after a relevant transfer, the transferee may present an originating application to the secretary of the Industrial Tribunal that the transferor has failed to comply with any provision of section 78I.
- (2) The Industrial Tribunal shall not consider the originating application under this section unless it is presented—
 - (a) before the end of the period of three months beginning with the date of the relevant transfer;
 - (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 originating application to be presented before the end of that period of three months.

- (3) Where the Industrial Tribunal finds the originating application under subsection (1) well-founded, it–
 - (a) shall make a declaration to that effect; and
 - (b) may make an award of compensation to be paid by the transferor to the transferee.
- (4) The amount of the compensation shall be such as the Industrial Tribunal considers just and equitable in all the circumstances, subject to subsection (5), having particular regard to–
 - (a) any loss sustained by the transferee which is attributable to the matters complained of; and
 - (b) the terms of any contract between the transferor and the transferee relating to the transfer under which the transferor may be liable to pay any sum to the transferee in respect of a failure to notify the transferee of employee liability information.
- (5) Subject to subsection (6), the amount of compensation awarded under subsection (3) shall be not less than £500 per employee in respect of whom the transferor has failed to comply with a provision of section 78L, unless the Industrial Tribunal considers it just and equitable, in all the circumstances, to award a lesser sum.
- (6) In ascertaining the loss referred to in subsection (4)(a) the Industrial Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to any damages recoverable under the common law, as applicable.
- (7) The provisions of the Trade Unions and Trade Disputes Act concerning conciliation and arbitration shall apply to the right conferred by this section and to proceedings under this section as it applies to the rights conferred by that Act and the Industrial Tribunal proceedings mentioned in that Act.

Duty to inform and consult representatives.

- 78K.(1) In this section and sections 78L and 78M references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) 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 the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—
- (a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
 - (b) the legal, economic and social implications of the transfer for any affected employees;
 - (c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
 - (d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of section 78C or, if he envisages that no measures will be so taken, that fact.
- (3) For the purposes of this section the appropriate representatives of any affected employees are—
- (a) if the employees are of a description in respect of which a trade union is recognised by their employer, representatives of the trade union; or

- (b) in any other case, whichever of the following employee representatives the employer chooses—
 - (i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;
 - (ii) employee representatives elected by any affected employees, for the purposes of this section, in an election satisfying the requirements of section 78L(1).
- (4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of subsection (2)(d).
- (5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.
- (6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.
- (7) In the course of those consultations the employer shall—
 - (a) consider any representations made by the appropriate representatives; and
 - (b) reply to those representations and, if he rejects any of those representations, state his reasons.

- (8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.
- (9) 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 subsections (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.
- (10) Where—
- (a) the employer has invited any of the affected employees to elect employee representatives; and
 - (b) the invitation was issued long enough before the time when the employer is required to give information under subsection (2) to allow them to elect representatives by that time,
- the employer shall be treated as complying with the requirements of this section in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.
- (11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employee the information set out in subsection (2).
- (12) The duties imposed on an employer by this section shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer.

Election of employee representatives.

78L.(1) The requirements for the election of employee representatives under section 78K(3) are that—

- (a) the employer shall make such arrangements as are reasonably practicable to ensure that the election is fair;
- (b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all affected employees having regard to the number and classes of those employees;
- (c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
- (d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under section 78K to be completed;
- (e) the candidates for election as employee representatives are affected employees on the date of the election;
- (f) no affected employee is unreasonably excluded from standing for election;
- (g) all affected employees on the date of the election are entitled to vote for employee representatives;
- (h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;
- (i) the election is conducted so as to secure that—
 - (i) so far as is reasonably practicable, those voting do so in secret; and

- (ii) the votes given at the election are accurately counted.
- (2) Where, after an election of employee representatives satisfying the requirements of subsection (1) has been held, one of those elected ceases to act as an employee representative and as a result any affected employees are no longer represented, those employees shall elect another representative by an election satisfying the requirements of subsection (1)(a), (e), (f) and (i).

Failure to inform or consult.

78M.(1) Where an employer has failed to comply with a requirement of section 78K or section 78L, an originating application may be presented to the secretary of the Industrial Tribunal on that ground—

- (a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;
 - (b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
 - (c) in the case of failure relating to representatives of a trade union, by the trade union; and
 - (d) in any other case, by any of his employees who are affected employees.
- (2) If on an originating application under subsection (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to 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) If on an originating application under subsection (1) a question arises as to whether or not an employee representative was an appropriate representative for the purposes of section 78K, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees.
- (4) On an originating application under subsection (1)(a) it shall be for the employer to show that the requirements in section 78L have been satisfied.
- (5) On an originating application against a transferor that he had failed to perform the duty imposed upon him by virtue of section 78K(2)(d) or, so far as relating thereto, section 78K(9), 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 78K(4) 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.
- (6) In relation to any originating application under subsection (1), a failure on the part of a person controlling (directly or indirectly) the employer 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.
- (7) Where the Industrial Tribunal finds the originating application against a transferee under subsection (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.
- (8) Where the Industrial Tribunal finds the originating application against a transferor under subsection (1) well-founded it shall make a declaration to that effect and may—

- (a) order the transferor, subject to subsection (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or
 - (b) if the originating application is that the transferor did not perform the duty mentioned in subsection (5) 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.
- (9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under subsection (8)(a) or subsection (11).
- (10) An employee may present an originating application to the secretary of the Industrial Tribunal on the ground that he is an employee of a description to which an order under subsection (7) or (8) relates and that—
- (a) in respect of an order under subsection (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order; or
 - (b) in respect of an order under subsection (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.
- (11) Where the Industrial Tribunal finds an originating application under subsection (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.
- (12) The Industrial Tribunal shall not consider an originating application under subsection (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—

- (a) in respect of an originating application under subsection (1), the date on which the relevant transfer is completed; or
- (b) in respect of an originating application under subsection (10), the date of the tribunal's order under subsection (7) or (8),

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 originating application to be presented before the end of the period of three months.

- (13) In this section "appropriate compensation" means such sum not exceeding four weeks pay for the employee in question as the Industrial Tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.
- (14) Regulation 28 of the Employment (Information and Consultation of Employees) Regulations 2005 shall apply for calculating the amount of a week's pay for any employee for the purposes of subsection (13) and, for the purposes of that calculation, the calculation date shall be—
 - (a) in the case of an employee who is dismissed by reason of redundancy (within the meaning of section 58A) the date which is the calculation date for the purposes of any entitlement of the employee to a redundancy payment or which would be that calculation date if the employee were so entitled;
 - (b) in the case of an employee who is dismissed for any other reason, the effective date of termination of the employee's contract of employment;
 - (c) in any other case, the date of the relevant transfer.

Failure to inform or consult : supplemental.

78N(1) The Industrial Tribunal Rules made under section 12 shall, as nearly as may be, govern the presentation, hearing and

determination of originating applications presented under section 78M.

- (2) A person aggrieved by a determination made by the Industrial Tribunal under section 78M or by the dismissal by the Industrial Tribunal of an originating application made under that section, may appeal to the Supreme Court on any question of law.
- (3) An appeal under subsection (2) 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.
- (4) 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 costs of the appeal.
- (5) The Industrial Tribunal (Appeals) Rules made under section 88 shall, subject to the provisions of section 78M and this section, apply as nearly as possible to any appeal brought under this section.

Contracting out against Part VIB.

78P. 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 78C, 78F or 78K or to preclude any person from presenting an originating application to the secretary of the Industrial Tribunal under section 78M.”.

Amendment of section 89 of the Act.

5. Section 89(1) of the Act is amended by substituting “78A to 78P” for “78A to 78K”.

Transitional provisions.

6.(1) These Regulations shall apply in relation to a relevant transfer that takes place on or after the date of the coming into operation of these Regulations.

(2) These Regulations shall not apply in relation to a relevant transfer that took place before the date of the coming into operation of these Regulations.

Dated 4th November, 2010.

P R CARUANA,
Chief Minister,
For the Government.

EXPLANATORY MEMORANDUM

These Regulations transpose into the law of Gibraltar Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. These Regulations also provide for matters incidental to the transposition of those two directives.

