

**SECOND SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**

**No. 3978 of 24 January, 2013**

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LEGAL NOTICE NO. 7 OF 2013.

**EMPLOYMENT ACT**

**FIXED-TERM EMPLOYEES (PREVENTION OF LESS  
FAVOURABLE TREATMENT) (AMENDMENT)  
REGULATIONS 2013**

In exercise of the powers conferred on him by section 86(1)(g) of the Employment Act and for the purposes of transposing into the law of Gibraltar Council Directive 97/81/EC of 15 December 1997 and the Extension Directive 98/23/EC of 7 April 1998 on the Framework Agreement on part-time work, the Minister with responsibility for employment has made the following Regulations—

**Title and commencement.**

1. These Regulations may be cited as the Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations 2013 and come into operation on the day publication.

**Amendment of regulations.**

2.(1) The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2003 are amended in accordance with this regulation.

(2) Regulation 1 is amended—

(a) in subregulation (1) after the words “Fixed-term” insert the words “and Part-time”; and

(b) in subregulation (2)—

(i) after the definition “contract of employment” insert the following definition—

““employee” means an individual who has entered into or works under or (except where a provision of these Regulations otherwise

requires) where the employment has ceased, worked under a contract of employment;” and

- (ii) for the definition “pro-rate principle” substitute the following definition—

““pro-rata principle”—

(a) in relation to fixed-term employees means that where a comparable permanent employee receives or is entitled to pay or any other benefit, a fixed-term employee is to receive or be entitled to such proportion of that pay or other benefit as is reasonable in the circumstances having regard to the length of his contract of employment and to the terms on which the pay or other benefit is offered;

(b) in relation to part-time employees means that where a comparable full-time employee receives or is entitled to receive pay or any other benefit, a part-time employee is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time employee;”.

- (3) After regulation 1 insert the following part heading—

**“PART II  
FIXED-TERM EMPLOYEES RIGHTS AND REMEDIES”**

- (4) In the heading to regulation 2, after “Comparable” insert the words “fixed-term”.

- (5) In the heading to regulation 7, for “etc.” substitute “by fixed-term employees”.

- (6) After regulation 9 insert—

**“PART IIA  
PART-TIME EMPLOYEES**

**Weekly hours.**

9A. In the definition of the pro rata principle, applicable to part-time employees, and in regulations 9C and 9D “weekly hours” means the number of hours an employee is required to work under his contract of employment in a week in which he has no absences from work and does not work any overtime or, where the number of such hours varies according to a cycle, the average number of such hours.

**Meaning of full-time employee, part-time employee and comparable full-time employee.**

9B.(1) A person is a full-time employee for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to employees employed by the employee’s employer under the same type of contract, is identifiable as a full-time employee.

(2) A person is a part-time employee for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to employees employed by the employee’s employer under the same type of contract, is not identifiable as a full-time employee.

(3) A full-time employee is a comparable full-time employee in relation to a part-time employee if, at the time when the treatment that is alleged to be less favourable to the part-time employee takes place—

- (a) both employees are—
  - (i) employed by the same employer under the same type of contract, and
  - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and

- (b) the full-time employee works or is based at the same establishment as the part-time employee or, where there is no full-time employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(4) For the purposes of sub-regulations (1), (2) and (3), the following shall be regarded as being employed under different types of contract—

- (a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship;
- (b) employees employed under a contract for a fixed term that is not a contract of apprenticeship;
- (c) employees employed under a contract of apprenticeship;
- (d) persons who are neither employees nor employed under a contract for a fixed term;
- (e) persons who are not employees but are employed under a contract for a fixed term;
- (f) any other description of employee that it is reasonable for the employer to treat differently from other employees on the ground that employees of that description have a different type of contract.

**Employees becoming part-time.**

9C.(1) This regulation applies to an employee who—

- (a) was identifiable as a full-time employee in accordance with regulation 9B(1); and
- (b) following a termination or variation of his contract, continues to work under a new or varied contract, whether of the same type or not, that requires him to work for a number of weekly hours that is lower than the number he was required to work immediately before the termination or variation.

(2) Notwithstanding regulation 9B(3), regulation 9E shall apply to an employee to whom this regulation applies as if he were a part-time employee and as if there were a comparable full-time employee employed under the terms that applied to him immediately before the variation or termination.

(3) The fact that this regulation applies to an employee does not affect any right he may have under these Regulations by virtue of regulation 9B(3).

**Employees returning part-time after absence.**

9D.(1) This regulation applies to an employee who—

- (a) was identifiable as a full-time employee in accordance with regulation 9B(1) immediately before a period of absence (whether the absence followed a termination of the employee's contract or not);
- (b) returns to work for the same employer within a period of less than 12 months beginning with the day on which the period of absence started;
- (c) returns to the same job or to a job at the same level under a contract, whether it is a different contract or a varied contract and regardless of whether it is of the same type, under which he is required to work for a number of weekly hours that is lower than the number he was required to work immediately before the period of absence.

(2) Notwithstanding regulation 9B(3), regulation 9E shall apply to an employee to whom this regulation applies (“the returning employee”) as if he were a part-time employee and as if there were a comparable full-time employee employed under—

- (a) the contract under which the returning employee was employed immediately before the period of absence; or
- (b) where it is shown that, had the returning employee continued to work under the contract mentioned in paragraph (a) a variation would have been made to its term during the period of absence, the contract mentioned in that sub-paragraph including that variation.

(3) The fact that this regulation applies to an employee does not affect any right he may have under these Regulations by virtue of regulation 9B(3).

**Less favourable treatment of part-time employees.**

9E.(1) A part-time employee has the right not to be treated by his employer less favourably than the employer treats a comparable full-time employee—

- (a) as regards the terms of his contract; or
- (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by sub-regulation (1) applies only if—

- (a) the treatment is on the ground that the employee is a part-time employee, and
- (b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time employee has been treated less favourably than a comparable full-time employee the pro rata principle shall be applied unless it is inappropriate.

(4) A part-time employee paid at a lower rate for overtime worked by him in a period than a comparable full-time employee is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time employee where, or to the extent that, the total number of hours worked by the part-time employee in the period, including overtime, does not exceed the number of hours the comparable full-time employee is required to work in the period, disregarding absences from work and overtime.

**Right to receive a written statement of reasons for less favourable treatment.**

9F.(1) If an employee who considers that his employer may have treated him in a manner which infringes a right conferred on him by regulation 9E requests in writing from his employer a written statement giving particulars of the reasons for the treatment, the employee is entitled to be provided with such a statement within 21 days of his request.

(2) A written statement under this regulation is admissible as evidence in any proceedings under these Regulations.

(3) If it appears to the tribunal in any proceedings under these Regulations—

- (a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement; or
- (b) that the written statement is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that the employer has infringed the right in question.

(4) This regulation does not apply where the treatment in question consists of the dismissal of an employee, and the employee is entitled to a written statement of reasons for his dismissal in accordance with any applicable law.

**Unfair dismissal and the right not to be subjected to detriment.**

9G.(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part VI of the Employment Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in sub-regulation (3).

(2) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in sub-regulation (3).

(3) The reasons or, as the case may be, grounds are—

- (a) that the employee has—
  - (i) brought proceedings against the employer under these Regulations;
  - (ii) requested from his employer a written statement of reasons under regulation 9F;
  - (iii) given evidence or information in connection with such proceedings brought by any employee;

- (iv) otherwise done anything under these Regulations in relation to the employer or any other person;
  - (v) alleged that the employer had infringed these Regulations; or
  - (vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations; or
- (b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in paragraph (a).

(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subsection to any act or deliberate failure to act, is that mentioned in sub-regulation (3)(a)(v), or (b) so far as it relates thereto, neither sub-regulation (1) nor sub-regulation (2) applies if the allegation made by the employee is false and not made in good faith.

(5) Sub-regulation (2) does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part VI of the Employment Act.

**Complaints to the industrial tribunal by part-time employees.**

9H.(1) Subject to regulation 9G(5), an employee may present a complaint to the Industrial tribunal that his employer has infringed a right conferred on him by regulation 9E or 9G(2).

(2) Subject to sub-regulation (3), the industrial tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of 3 months beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.

(3) The industrial tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(4) For the purposes of calculating the date of the less favourable treatment or detriment under sub-regulation (2)–



- (a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;
  - (b) where an application relies on regulation 9C or 9D the less favourable treatment shall be treated as occurring on, and only on, in the case of regulation 9C, the first day on which the applicant worked under the new or varied contract and, in the case of regulation 9D, the day on which the applicant returned; and
  - (c) a deliberate failure to act contrary to regulation 9E or 9G(2) shall be treated as done when it was decided on.
- (5) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of sub-regulation (4)(c) to decide not to act—
- (a) when he does an act inconsistent with doing the failed act; or
  - (b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act if it was to be done.
- (6) Where an employee presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment.
- (7) Where the industrial tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—
- (a) making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;
  - (b) ordering the employer to pay compensation to the complainant;
  - (c) recommending that the employer take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or

reducing the adverse effect on the complainant of any matter to which the complaint relates.

(8) Where the industrial tribunal finds a complaint to be well founded on the ground that the complainant has been treated less favourably in respect of either the terms on which he is afforded access to membership of an occupational pension scheme or his treatment under the rules of such a scheme, the steps taken by the tribunal under sub-regulation (7) as regards that less favourable treatment shall not relate to a period earlier than 2 years before the date on which the complaint was presented.

(9) Where the tribunal orders compensation under sub-regulation (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances (subject to sub-regulation (8)) having regard to—

- (a) the infringement to which the complaint relates; and
- (b) any loss which is attributable to the infringement having regard, in the case of an infringement of the right conferred by regulation 9E, to the pro rata principle except where it is inappropriate to do so.

(10) The loss shall be taken to include—

- (a) any expenses reasonably incurred by the complainant in consequence of the infringement; and
- (b) loss of any benefit which he might reasonably be expected to have had but for the infringement.

(11) Compensation in respect of treating an employee in a manner which infringes the right conferred on him by regulation 9E shall not include compensation for injury to feelings.

(12) 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 of Gibraltar.

(13) 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.

(14) If the employer fails, without reasonable justification, to comply with a recommendation made by an employment tribunal under sub-regulation (7)(c) the tribunal may, if it thinks it just and equitable to do so—

- (a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under sub-regulation (7)(b); or
- (b) make an order under sub-regulation (7)(b).

**Restrictions on contracting out.**

9I. Section 77F of the Employment Act (Prohibition of contracting out against Part VIA) shall apply in relation to these Regulations as if they were contained in that Act.”

(7) In regulation 12 on both occasions the words “a fixed-term” appear substitute “an”.

Dated 24th January, 2013.

J J BOSSANO,  
Minister with responsibility for employment.

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**EXPLANATORY MEMORANDUM**

These Regulations transpose into the law of Gibraltar Council Directive 97/81/EC of 15 December 1997 and the Extension Directive 98/23/EC of 7 April 1998 on the Framework Agreement on part-time work.