

**ST HELENA**

**REVISED EDITION OF THE LAWS, 2017**

**EMPLOYMENT & COMMERCE**

**EMPLOYMENT RIGHTS ORDINANCE, 2010<sup>1</sup>**

*Ordinance 9 of 2010*

*In force 1 August 2012 and 1 April 2013*

*Amended by Ordinances 10 of 2012, 13 of 2016, 13 of 2017, 6 of 2020*

*Subsidiary legislation:*

**EMPLOYMENT RIGHTS (LABOUR REGULATING AUTHORITY)  
REGULATIONS, 2013**

*Legal Notice 13 of 2013*

*Amended by L.N. 2/2017 (in force 30 Jan 2017)*

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**EMPLOYMENT RIGHTS (MINIMUM WAGE) REGULATIONS, 2013**

*Legal Notice 24 of 2013*

*Amended by L.N. 6/2015; L.N. 13/2017; L.N. 8/2018*

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**EMPLOYMENT RIGHTS (LEAVE ENTITLEMENT) REGULATIONS, 2015**

*Legal Notice 4/2015*

*Amended by L.N. 1/2020*

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<sup>1</sup> Under section 10 of the Revised Edition of the Laws Ordinance, 1999 this text is authoritative and is the sole authentic edition in respect of the law contained in it as at 1 April 2020.

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AN ORDINANCE to make new provisions relating to employment and rights of employees, and to create a framework for enforcement of such rights; and for connected and incidental purposes.

**CHAPTER I**  
**PRELIMINARY AND INTERPRETATION**

**Short title and commencement**

- 1. (1) This Ordinance may be cited as the Employment Rights Ordinance, 2010.
- (2) This Ordinance comes into force on a date the Governor appoints by notice in the *Gazette*.
- (3) A notice under subsection (2) may appoint different dates for different provisions or for different purposes of the same provision.

**Interpretation**

- 2. In this Ordinance, unless the context otherwise indicates—  
“**agency worker**” means an individual who is supplied by a person (“the agent”) to do work for another person (“the principal”) under a contract or other arrangements made between

the agent and the principal, but where such individual is—

- (a) not an employee as respects that work because of the absence of an employment contract between the individual and the agent or principal; and
- (b) not a party to a contract under which he or she undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of the profession or business undertaking of the individual;

“**Committee**” means the Employment Rights Committee established by section 7;

“**dismissal**” has the meaning assigned in section 32;

“**effective date of termination**” means the date referred to in section 33;

“**employee**” means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

- (a) a contract of service or apprenticeship, whether express (oral or in writing) or implied; or
- (b) any other contract, whether express (oral or in writing) or implied, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to “**employment**” and “**employed**” is to be construed accordingly;

“**employer**”, in relation to an employee, means the person by whom the employee is (or, where the employment has ceased, was) employed and in the case of an agency worker, includes for purposes of Chapter III the person who is under section 5(2) deemed to have entered into an employment contract with such agency worker;

“**minimum wage**” means the hourly rate as determined from time to time under section 11;

“**pay reference period**” means the period in respect of which minimum wage has been determined under section 11(1);

“**Regulator**” means the Labour Regulating Authority appointed under section 3(1) and, unless the context requires otherwise, includes a Deputy Labour Regulating Authority appointed under section 3(2);

“**remuneration**” means any sum payable to the employee in connection with his or her employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under the contract or otherwise, but does not include and payment—

- (a) by way of an advance under an agreement for a loan;
- (b) in respect of expenses incurred by the employee in carrying out his or her employment;
- (c) to the employee otherwise than in his or her capacity as an employee.

## CHAPTER II LABOUR REGULATING AUTHORITY

### Labour Regulating Authority

**3.<sup>2</sup> (1)** There is continued a Labour Regulating Authority which has the powers and functions conferred or imposed on the Labour Regulating Authority by this or any other Ordinance and which is to be comprised of three persons appointed by the Governor by Notice published in the Gazette as follows—

- (a) a chairman who must be the Chief Magistrate appointed as such in accordance with section 7 of the Magistrates’ Court Ordinance, 2011; and

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<sup>2</sup> Section 3 substituted by Ord. 6 of 2020

(b) 2 other persons appointed at the discretion of the Governor.

(2) The Governor may appoint a Deputy Labour Regulating Authority.

(3) The remuneration of a person comprising the Labour Regulating Authority pursuant to subsection (1)(b) shall be £600 per annum which shall be paid out of the Consolidated Fund and which may be increased by the Governor in Council as the Governor in Council determines fit and any such increase shall be published by Notice published in the Gazette.

### **Duties of Labour Regulating Authority**

4. It is the duty of the Labour Regulating Authority—

- (a) to promote and protect the rights of employees granted under this Ordinance;
- (b) to advise the Governor in Council and any relevant Council Committee on labour protection issues;
- (c) to investigate and determine claims made by employees under this Ordinance; and
- (d) to prepare and publish guidelines on best practice and codes of practice in employment protection for employers, employees and workers.

## **CHAPTER III MINIMUM WAGE**

### *Part A Application of Chapter*

#### **Application of Chapter**

5. (1) Subject to section 6, this Chapter applies to—

- (a) all employees who are above compulsory school age, as described in section 34 of the Education Ordinance, 2008; and
- (b) all agency workers.

(2) For purposes of the application of this Chapter to an agency worker under subsection (1)(b), all the provisions of this Chapter have effect as if an employment contract for doing the relevant work was entered into between the agency worker and—

- (a) the agent or principal, whichever is responsible for paying the agency worker in respect of the work; or
- (b) if neither the agent nor the principal is so responsible, whichever of them actually pays the agency worker in respect of the work.

(3) The Governor in Council may by regulation make provision for this Chapter to apply, with or without modifications, to any individual of a prescribed description who would not otherwise be an employee for the purposes of this Chapter, as if—

- (a) such individual were an employee for purposes of this Chapter;
- (b) such individual worked under an employment contract of a prescribed description; and
- (c) a person of a prescribed description were the employee under such contract.

#### **Persons excluded from application**

- 6. (1)** This Chapter does not apply to—
- (a) any person employed as master or member of the crew of a fishing vessel, if the person is remunerated in respect of such employment solely by sharing in the profits or gross earnings of the vessel;
  - (b) any person employed by a charity, voluntary organisation or statutory body if, under the terms of his or her employment (apart from this Chapter), the person is not entitled to—
    - (i) any monetary payments of any description in respect of, or otherwise in connection with, the employment in question (except in respect of expenses actually incurred, or reasonably estimated as likely to be incurred, in the performance of his or her duties); or
    - (ii) any benefits in kind of any description in respect of, or otherwise in connection with, the employment in question (other than the provision of his or her subsistence or accommodation that is reasonable in the circumstances of the employment); or
  - (c) any prisoner detained in, or on temporary release from, a prison.

**(2)** In this section—

“**charity**” means a body of persons, or the trustees of a trust, registered under the Charities Ordinance, 2005;

“**statutory body**” means a body established by an Ordinance;

“**voluntary organisation**” means a body of persons, or the trustees of a trust, which is established only for benevolent, philanthropic, or similar purposes, but which is not a charity.

## ***Part B***

### ***Employment Rights Committee***

#### **Employment Rights Committee**

**7.<sup>3</sup> (1)** This section establishes a committee to be known as the Employment Rights Committee, to discharge the functions conferred upon it by this Part.

**(2)** The Committee is to consist of 5 members appointed by the Governor, and must include—

- (a) a member of the Legislative Council;
- (b) an employee of the St Helena Government who has responsibility for economic or social policy development;
- (c) a representative of private sector employers;
- (d) a member of an organisation representative of employees; and
- (e) one other person whom the Governor considers suitable to serve on the Committee.

**(3)** The remuneration of a member of the Employment Rights Committee shall be £450 per annum which shall be paid out of the Consolidated Fund and which may be increased by the Governor in Council as the Governor in Council determines fit and any such increase shall be published by Notice published in the Gazette.

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<sup>3</sup> Section 7 amended by Ord. 6 of 2020

(4) Subsection (3) does not apply to persons appointed pursuant to subsection (2)(a) or (b).

### **Functions of Committee**

8. (1) The Committee must, at least once every calendar year, and at any other time upon request of the Governor in Council or a Council Committee, make recommendations to the Governor in Council with respect to—

- (a) the hourly rate to be prescribed under section 11(1);
- (b) the pay reference period for which the hourly rate is to apply;
- (c) the method to be used for determining the hourly rate at which a person is to be regarded as remunerated for purposes of this Chapter;
- (d) any exclusions or modifications which should be made for specified classes of persons under section 11(2);
- (e) any classes of persons to which any exclusions or modifications under section 11(2) should apply.

(2) The annual recommendations under subsection (1) must be made at least 3 months before the expiry of the current pay reference period.

(3) The Committee must, upon request of the Governor in Council or a Council Committee, make recommendations to the Governor in Council with respect to the matters to be prescribed under section 27.

### **Matters to be considered by Committee**

9. (1) Before arriving at any recommendations under section 8, the Committee must consult—

- (a) such organisations representative of employers as they think fit;
- (b) such organisations representative of employees as they think fit; and
- (c) if they think fit, any other body or person.

(2) In considering what recommendations to include in their report, the Committee must—

- (a) have regard to the effect of this Chapter on the economy of St Helena as a whole and on competitiveness; and
- (b) take into account any additional factors specified by the Governor in Council in a request under section 8 or otherwise.

### **Report by Committee**

10. (1) The recommendations of the Committee under section 8 must be in the form of reports to the Governor in Council and such reports must—

- (a) identify the members of the Committee making the report;
- (b) explain the procedures adopted in respect of consultation, the taking of evidence and the receiving of representations;
- (c) set out the reasons for their recommendations; and
- (d) if the Governor in Council has specified any additional factor to be taken into account, state that they have taken that factor into account in making their



recommendations.

(2) A copy of the report must be laid before the Legislative Council and be published in the *Gazette*.

### ***Part C*** ***Determination of minimum wage***

#### **Determination of minimum wage**

11. (1) The minimum wage is such single hourly rate as the Governor in Council prescribes<sup>4</sup> by notice in the *Gazette* for a relevant pay reference period.

(2) The Governor in Council may in the notice issued under subsection (1) make provision for exclusions or modifications for certain classes of persons.

#### **Governor in Council to take into account recommendations of the Committee**

12. (1) The Governor in Council must, in determining any matter under sections 8, 11 or 27, take into consideration the recommendations of the Committee made in any report under section 10.

- (2) If the Governor in Council decides in determining any matter under section 11—
- (a) not to make any regulations to implement the Committee's recommendations;
  - (b) to make regulations which do not implement or which implement only in part the recommendations of the Committee; or
  - (c) to make any other regulation in respect of a matter upon which the Committee could or should have made a recommendation under section 8(1) but which does not relate to a recommendation made by the Committee,

the Governor in Council must lay a report before the Legislative Council which must include all matters upon which they have made a determination and setting out the reasons for such decisions.

(3) If the Committee fails to make a report in the form specified in section 10 within the period required by or under this Ordinance or within the period requested by the Governor in Council on any matter, the Governor in Council may decide on the matter and if they so do, must lay a report before Legislative Council in accordance with subsection (2).

### ***Part D*** ***Payment of minimum wage and statements***

#### **Employer to pay at least minimum wage**

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<sup>4</sup> *Gazette Notice No. 239 of 20 December 2019: Hourly rate for period 1 April 2020 to 31 March 2021: £3.18 per hour for persons aged 18 years and older and £2.23 per hour for persons under the age of 18 years. Exclusions under subsection (2):*

- (a) *employees whose work is substantially undertaken outside St Helena under the terms of their contract of employment;*
- (b) *a person participating in a scheme designed to provide work experience;*
- (c) *payments made under a pension scheme or by way of a gratuity or redundancy payment;*
- (d) *payments made under a court order unless such order is made in connection with payment of the minimum wage.*

**13. (1)** Every employer must remunerate each employee in respect of his or her work in any pay reference period at a rate which is not less than the minimum wage.

- (2)** Any agreement, whether a contract of employment or not, is void in so far as it—
- (a)* excludes or limits the operation of any of the provisions relating to minimum wage; or
  - (b)* precludes an employee from exercising his or her rights or instituting any proceedings under this Chapter.

### **Employer to provide worker with statement**

**14.** An employer must before or at the time when any payment of remuneration is made to an employee, provide the employee with a written statement containing—

- (a)* the name of the employee and employer;
- (b)* the date when the employment of the employee started with the employer;
- (c)* if the employee is paid at an hourly rate or payment of remuneration is determined with reference to the number of hours worked - the hours that the employee worked during the period to which the statement relates;
- (d)* the gross amount of remuneration;
- (e)* any deductions made from the amount of remuneration;
- (f)* the net amount of remuneration;
- (g)* if different parts of the net amount are paid in different ways - the amount and method of payment of each part-payment;
- (h)* any other information prescribed by the Governor in Council by regulation.

### **Duty of employers to keep records**

**15. (1)** Every employer must keep records of payments made to employees in a form and manner prescribed by the Governor in Council by regulation.

**(2)** The records referred to in subsection (1) relating to any payment must be kept for the current tax year plus the 7 previous tax years from the date of such payment.

**(3)** The Regulator may, by giving 7 days' written notice, require an employer to produce to the Regulator the records kept by the Regulator for the purposes of this section.

**(4)** If the Regulator at any stage suspects or becomes aware that an employer is not keeping records as required by this section, the Regulator must investigate the matter and if he or she determines that such records are not being kept, or have not been produced to the regulator as required by a notice under subsection (3), the Regulator—

- (a)* must order the employer to keep records in respect of any future payments made to employees as required by subsection (1); and
- (b)* may order the employer to pay a financial penalty not exceeding £1,000.

## ***Part E***

### ***Enforcement of employee's right to minimum wage and records***

#### **Enforcement of minimum wage**

**16. (1)** If an employee who qualifies for the minimum wage is remunerated during any period by his or her employer at a rate which is less than the minimum wage, the employee is deemed to be entitled under the employment contract to be paid, as additional remuneration in respect of that period, the difference between—

- (a) the actual remuneration received by the employee for such period; and
- (b) the relevant remuneration which the employee would have received for such period had he or she been remunerated by the employer at a rate equal to the minimum wage.

**(2)** In a case where there is or was no employment contract between the person, who is the employee, and the employer for the purposes of this Chapter, it must be assumed that there is or was such a contract for the purpose of enabling the amount described as additional remuneration to be recovered in civil proceedings on a claim in contract.

### **Employee's right of access to records**

**17. (1)** If the employee believes on reasonable grounds that he or she is being or may be, or at any time during any immediately preceding period of 12 months has been or may have been remunerated by the employer at a rate which is less than the minimum wage, the employee may require the employer to produce any relevant records and inspect and examine those records and copy any part of them.

**(2)** The rights conferred by subsection (1) are exercisable only for the purpose of establishing whether or not the employee is being, or has been, remunerated by his or her employer at a rate which is less than the minimum wage and are exercisable by—

- (a) the employee alone; or
- (b) the employee accompanied by any other person the employee thinks fit.

**(3)** In order to exercise any right under subsection (1), the employee must give notice to the employer requesting the production of any relevant records relating to a period described in the notice, and if the employee intends to exercise the right conferred by subsection (2)(b), the notice must contain a statement of that intention.

**(4)** If notice is given under subsection (3), the employer must give the employee reasonable notice of the time and place at which the relevant records will be produced, which place must be—

- (a) the employee's place of work;
- (b) any other place at which it is reasonable, in all the circumstances, for the employee to attend to inspect the relevant records; or
- (c) some other place agreed between the employee and the employer.

**(5)** The records must be produced—

- (a) within 14 days from the date of receipt of the notice under subsection (3); or
- (b) at a later time agreed during that period between the employee and the employer.

### **Complaint for failure to provide statements or allow access to records**

**18. (1)** If an employer fails to provide any written statement under section 14 or to allow the employee to exercise some or all of the rights conferred by section 17, the employee may lodge a complaint with the Regulator.

(2) The Regulator must investigate the complaint and, if the Regulator thinks fit, may serve a notice on the employer ordering the employer—

- (a) in the case of failure to provide any statement under section 14, to provide such statement within a time specified in the notice;
- (b) in the case of failure to allow any rights under section 17, to pay to the worker a sum equal to 80 times the hourly amount of the minimum wage (as in force when the award is made); and
- (c) to pay a financial penalty not exceeding £200.

(3) Subject to subsection (2A), the Regulator must not consider a complaint under this section unless it is presented to the Regulator before the expiry of the period of 3 months—

- (a) from the date that the employer failed to provide the statement under section 14; or
- (b) following the end of the period of 14 days (or later if so agreed) referred to in section 17(5),

as the case may be.

(2A) The Regulator may consider the complaint if it is presented within a further period the Regulator considers reasonable if the Regulator is satisfied that it was not reasonably practicable for a complaint under this section to be presented within the prescribed period.

(4) An order under subsection (2) may relate to more than one employee and may be so framed as to relate to employees specified in the order or to employees of a description so specified.

(5) Failure by an employer to keep records as required by section 15 does not relieve the employer from the liability to provide access to records and for the purposes of this section is deemed to be failure by the employer to allow the employee to exercise some or all of the rights conferred by section 17.

### **Complaint for failure to pay at least minimum wage**

**19. (1)** If an employee, after exercising his or her rights under section 17, is of the opinion that he or she has for any period not been remunerated by his or her employer at a rate at least equal to the minimum wage, the employee may lodge a complaint with the Regulator—

- (a) within 14 days after receiving the records under section 17; or
- (b) if the employer fails to provide such records within the period prescribed under section 17, within 14 days after expiry of the prescribed period.

(2) The Regulator must investigate the complaint and, if he or she thinks fit, may serve a notice on the employer ordering the employer—

- (a) to pay to the employee within a time specified in the notice the sum due to the employee under section 16(1);
- (b) to remunerate the employee for any further periods ending on or after the date of the notice at a rate equal to the minimum wage; and
- (c) subject to subsection (4), to pay a financial penalty equal to 50% of the amount referred to in paragraph (a) in respect of all employees to whom the order relates, up to a maximum of £5,000.

(3) The Regulator may in the notice under subsection (2) order the employer to pay to the employee, in addition to the amount referred to in subsection (2)(a), an amount (not exceeding £200) the Regulator considers appropriate in the circumstances to compensate the employee for any financial loss or inconvenience sustained by the employee which is attributable to the underpayment or the exercise of the employee's rights in pursuing such underpayment.

(4) If the employer pays the full amount referred to in subsections (2)(a) and (3) plus half of the amount of the financial penalty referred to in subsection (2)(c) within 14 days from the date of the order, the employer is deemed to have paid the full amount of the financial penalty.

(5) An order under subsection (2) may relate to more than one employee and may be so framed as to relate to employees specified in the order or to employees of a description so specified.

## CHAPTER IV PROTECTION OF EMPLOYEE RIGHTS

### *Part A* *Employment Particulars and Procedures*

#### **Statement of initial employment particulars**

**20. (1)** An employer must, when an employee begins employment with the employer, give to the employee a written statement of particulars of employment.

(2) Subject to subsection (4), the statement must be given to the employee not later than 2 months after the beginning of the employment.

- (3) The statement must contain particulars of—
- (a) the names of the employer and employee;
  - (b) the date when the employment began;
  - (c) the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period);
  - (d) the place of work or, if the employee is required or permitted to work at various places, an indication of such place or places;
  - (e) the title of the job which the employee is employed to do or a brief description of the work for which he or she is employed;
  - (f) if the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;
  - (g) the scale or rate of remuneration or the method of calculating remuneration;
  - (h) the intervals at which remuneration is payable;
  - (i) any terms and conditions relating to hours of work;
  - (j) any terms and conditions relating to entitlement to holidays, including public holidays, and holiday pay;
  - (k) the number of paid sick absence days to which the employee is entitled;
  - (l) any terms and conditions relating to entitlement to unpaid emergency time off to care for dependent and parental leave;

- (m) any applicable pensions and pension schemes;
- (n) the length of notice which the employee is obliged to give and entitled to receive to terminate the contract of employment;
- (o) information relating to disciplinary and grievance procedures as referred to in section 21;
- (r) reference to any collective agreements affecting the employee's conditions of employment;
- (s) if the employee is required to work outside St Helena for a period of more than one month—
  - (i) the period for which he or she is to work outside St Helena;
  - (ii) the currency in which remuneration is to be paid while he or she is working outside St Helena;
  - (iii) any additional remuneration payable to the employee, and any benefits to be provided to or in respect of the employee, by reason of the employee being required to work outside St Helena; and
  - (iv) any terms and conditions relating to his or her return to St Helena;
- (t) any other information prescribed by the Governor in Council by regulation.

(5) This section does not apply in respect of any employer or the employees of an employer that does not at any time employ more than 2 employees.

### **Information on disciplinary and grievance procedures**

- 21. (1)** The statement of particulars under section 20 must include a note—
- (a) specifying any disciplinary rules applicable to the employee or referring the employee to the provisions of a document specifying such rules which is reasonably accessible to the employee;
  - (b) specifying—
    - (i) a person to whom the employee can apply if dissatisfied with any disciplinary decision relating to him or her;
    - (ii) a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his or her employment; and
    - (iii) the manner in which any such application should be made; and
  - (c) if there are further steps consequent on any such application, explaining those steps or referring to the provisions of a document explaining them which is reasonably accessible to the employee.

(2) Subsection (1) does not apply if on the date the employee's employment began, the employer employed fewer than 10 employees but applies from any date thereafter that the employer employs 10 or more employees.

### **Complaint for failure to provide statement of employment particulars**

**22. (1)** If an employer fails to provide an employee with a written statement as required by section 20, the employee may lodge a complaint with the Regulator.

(2) The Regulator must investigate the complaint and if the he or she finds that an employer has failed to comply with sections 20 or 21, must serve a notice on the employer ordering the employer to—

- (a) provide a written statement complying with such sections within 7 days;

(b) pay a financial penalty not exceeding £200.

(3) The Regulator may also in the notice under subsection (2) order the employer to pay to the employee an amount (not exceeding £200) the Regulator considers appropriate in the circumstances to compensate the employee for any financial loss or inconvenience sustained by the employee which is attributable to the failure to provide the written statement or full particulars.

(4) If a statement purporting to comply with section 20 has been given to an employee and a question arises as to the particulars which ought to have been included in the statement so as to comply with sections 20 or 21 -

- (a) either the employer or the employee may refer the matter to the Regulator; and
- (b) the Regulator must, subject to subsection (5), determine what particulars ought to have been included in such statement and may either confirm the particulars as included in the statement given by the employer, amend those particulars or substitute other particulars for them.

(5) The Regulator must not determine any question with respect to the accuracy of any amount stated in the statement provided.

(6) The Regulator must not consider any reference under this section if the employment to which the reference relates has ceased, unless the application requiring the reference was made within 3 months after the date on which the employment ceased, or a further period the Regulator considers reasonable if satisfied that it was not reasonably practicable for the application to be made within the 3-month period.

## ***Part B*** ***Protection of Remuneration***

### **Right not to suffer unauthorised deductions**

**23. (1)** An employer must not make a deduction from any remuneration paid to an employee, unless—

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or under the employee's contract;
- (b) the employee has previously signified in writing his or her agreement or consent to the making of the deduction;
- (c) the purpose of the deduction is the reimbursement of the employer in respect of an overpayment made by the employer of any remuneration or of any expenses incurred by the employee in carrying out his employment; or
- (d) the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of an amount by the employee.

(2) If the total amount of remuneration paid on any occasion by an employer to an employee is less than the total amount of remuneration properly payable on that occasion (after allowable deductions), the amount of the deficiency is for purposes of this Part deemed to be a deduction made by the employer from the employee's remuneration.

(3) Subsection (2) does not apply in so far as the deficiency is attributable to an error on the part of the employer affecting the computation by the employer of the gross amount

of the remuneration properly payable to the employee.

### **Right not to have to make payments to employer**

**24. (1)** An employer must not receive any payment from a person employed by the employer unless—

- (a) the payment is required or authorised to be made by virtue of a statutory provision or a relevant provision of the employee's contract; or
- (b) the employee has previously signified in writing his or her agreement or consent to the making of the payment.

**(2)** Any reference in this Part to an employer receiving a payment from a person employed by the employer is a reference to the employer receiving such a payment in the employer's capacity as the person's employer.

### **Remuneration determined by reference to shortages**

**25. (1)** This section applies where, by virtue of an agreement in writing between an employee in retail employment and his or her employer, the amount of the employee's remuneration, or any part of it, is or may be determined by reference to the incidence of cash shortages or stock deficiencies.

**(2)** If the gross amount of the remuneration of an employee, determined with reference to any pay day, is, on account of any shortages or deficiencies, less than the gross amount of the remuneration, that would have been determined, had there been no such shortages or deficiencies—

- (a) the amount of remuneration payable to the employee on that day is deemed to be the amount of the gross amount determined as if there had been no such shortages or deficiencies; and
- (b) the employer may, subject to subsections (3) and (4), deduct from the remuneration paid by the employer to the employee on that pay day, or any future pay day, the amount representing the difference between the gross amount referred to in paragraph (a) and the gross amount determined after taking into account such shortages or deficiencies, and such deduction is not an unauthorised deduction under section 24.

**(3)** If the employer of an employee in retail employment makes a deduction or deductions from the remuneration payable to the employee as contemplated in subsection (2)—

- (a) the amount or total amount of the deduction or deductions on any pay day must not exceed one-tenth of the gross amount of the remuneration payable to the employee on that day; but
- (b) if the employee ceases to be employed by the employer, the employer may deduct the full outstanding amount from any payment made to the employee on or after termination of his or her employment.

**(4)** No deduction may be made under subsection (2)(b) unless the deduction, or the first in a series of deductions by virtue of subsection (3), is made within 12 months of the date when the employer established the existence of the shortage or the deficiency, or the date when the employer ought reasonably to have so established its existence.



### **Complaint relating to deduction or requiring payment**

**26. (1)** If an employer deducts any amount from the remuneration of an employee or requires any payment to be made by an employee otherwise than as provided for in section 23, 24 or 25, the employee may lodge a complaint with the Regulator.

**(2)** The Regulator must investigate the complaint and if the Regulator finds that the employer has made a deduction from remuneration or any payment was received from the employee otherwise than as provided for in section 23, 24 or 25, the Regulator must serve a notice on the employer ordering the employer—

- (a)* to pay to the employee a sum not exceeding the total sum of the deduction or payment so made; and
- (b)* to pay a financial penalty not exceeding £200.

**(3)** The Regulator may, in the notice under subsection (2), order the employer to pay to the employee, in addition to the amount referred to in subsection (2)(a), an amount (not exceeding £200) the Regulator considers appropriate in the circumstances to compensate the employee for any financial loss or inconvenience sustained by the employee which is attributable to the deduction or payment required from the employee.

**(4)** The Regulator must not consider any reference under this section, unless the reference was made within 3 months after the date on which the deduction (or the last in a series of deductions) was made or on which payment was required to be made by the employee, or a further period the Regulator considers reasonable if satisfied that it was not reasonably practicable for the application to be made within the 3- month period.

### **Right to equal pay for women**

**26A.** An employer must not remunerate any female employee at a rate which is lower than the rate at which a male employee in a similar position and with equal skills and experience is, or would be, remunerated.

### **Complaint relating to equal pay for women**

**26B. (1)** If a female employee is of the opinion that she has for any period been remunerated by her employer at a rate which is lower than the rate at which a male employee in a similar position and with equal skills and experience would be paid, she may lodge a complaint with the Regulator within 30 days after becoming aware that she is being paid at such lower rate.

**(1A)** The Regulator may allow a further period he or she considers reasonable if satisfied that it was not reasonably practicable for a complaint under subsection (1) to be presented within the 30 days prescribed in that subsection.

**(2)** The Regulator must investigate the complaint and for purposes of such investigation, the Regulator may require the employer to produce any relevant records and inspect and examine those records and copy any part of them, but may do so solely for the purpose of establishing whether or not the employee is being, or has been, remunerated by her employer at a lower rate.

(3) If the Regulator is of the opinion that the employee's claim is valid, the Regulator may serve a notice on the employer ordering that—

- (a) the employee is entitled under her employment contract to be paid, as additional remuneration in respect of the relevant period, the difference between the actual remuneration received by the employee for such period and the relevant remuneration which the employee would have received for such period had she been remunerated by the employer at the rate of a male employee with equal skills and experience in a similar position;
- (b) the employer must remunerate the employee for any further periods ending on or after the date of the notice at least at such higher rate; and
- (c) subject to subsection (5), to pay a financial penalty equal to 50% of the amount referred to in paragraph (a), up to a maximum of £5,000.

(4) The Regulator may in the notice under subsection (3) order the employer to pay to the employee, in addition to the amount referred to in subsection (3)(a), an amount (not exceeding £200) the Regulator considers appropriate in the circumstances to compensate the employee for any financial loss or inconvenience sustained by her which is attributable to the underpayment or the exercise of her rights in pursuing such underpayment.

(5) If the employer pays the full amount referred to in subsections (3)(a) and (4) plus half of the amount of the financial penalty referred to in subsection (3)(c) within 14 days from the date of the order, the employer is deemed to have paid the full amount of the financial penalty.

### *Part C*

#### *Work times and leave entitlement*

##### **Working hours and leave periods**

27.<sup>5</sup> (1) Except for the provision of emergency services and essential public services, no person may be compelled to perform any work on a Sunday or on any public holiday

(2) If the Committee so recommends, on the request of the Governor in Council or a Council Committee under section 8(3), regulations made under section 49 may prescribe—

- (a) rest periods (during any daily or weekly periods) whereby an employee is entitled to a minimum daily rest period in any 24 hour period;
- (b) the maximum number of working hours in a week averaged over a 17 week period;
- (c) the maximum number of working hours to be worked by night workers in any 24 hour period;
- (d) the minimum period of paid annual leave to which an employee is entitled;
- (e) the right of an employee to unpaid parental leave for the purpose of caring for a child;
- (f) the right of an employee to unpaid leave to attend to or care for a dependant in prescribed circumstances;
- (g) the right to paid or unpaid sick leave;
- (h) the circumstances under which an employer must permit an employee to take time

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<sup>5</sup> Section 27 amended by Ord. 6 of 2020

off during the employee's working hours for the purpose of performing the duties of any public office;

- (i) the right of an employee to paid or unpaid maternity, parental and adoption leave;
- (j) categories of persons to whom subsection (1) does not apply.

(3) For the purposes this section—

**“emergency services”** means police, fire and ambulance services and any other such service that may be required in an emergency to deal with the preservation of life and property;

**“essential public services”** means services that are essential to ensure the health, safety and welfare of the public;

**“public holiday”** means any day which is observed as a holiday under the Public Holidays Ordinance, 1945;

**“public office”** means any office to which a person is appointed under the provision of any Ordinance.

### **Complaint relating to working hours and leave periods**

**28. (1)** If an employer requires an employee to work hours, or fails to allow any rest period, or postpones or fails to allow any leave period, otherwise than as provided for in the regulations referred to in section 27, the employee may lodge a complaint with the Regulator.

(2) The Regulator must investigate the complaint and if he or she thinks fit may serve a notice on the employer ordering the employer to pay—

- (a) to the employee an amount of compensation the Regulator considers just and equitable in the circumstances having regard to the employer's conduct and any loss sustained by the employee which is attributable to the matter which is subject to the complaint; and
- (b) a financial penalty not exceeding £200.

(3) The Regulator must not consider any reference under this section, unless the reference was made within 3 months from the date of failure by the employer to comply with the regulations, or a further period the Regulator considers reasonable if satisfied that it was not reasonably practicable for the application to be made within the 3-month period.

## ***Part D***

### ***Detrimental act due to enforcement of right***

#### **Rights not to suffer detriment due to enforcement**

**29. (1)** An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer, done on the ground that—

- (a) action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing or otherwise securing the benefit of a right of such employee to which this Ordinance applies; or
- (b) the employer was prosecuted for an offence under this Ordinance as a result of action taken by or on behalf of the employee for the purpose of enforcing or otherwise securing the benefit of a right of the employee to which this Ordinance applies.

(2) It is immaterial for the purposes of subsection (1) whether or not the employee has

the right referred to in subsection (1)(a) or (b) or whether or not such right has been infringed, but, for that section to apply, the claim to such right and the claim that it has been infringed must be made in good faith.

(3) This section does not apply if a person is dismissed in circumstances where the provisions of Chapter V relating to unfair dismissal do not apply to the dismissal, or where the detriment in question amounts to a fair dismissal.

### **Complaint relating to detriment**

30. (1) An employee who has been subjected to a detriment in contravention of section 29 may lodge a complaint with the Regulator.

(2) The Regulator must investigate the complaint and if he or she fit may serve a notice on the employer ordering the employer to pay to the employee an amount of compensation in respect of the act or failure to act to which the complaint relates.

(3) The amount of the compensation awarded must be such as the Regulator considers just and equitable in all the circumstances having regard to—

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

(4) The loss must be taken to include—

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

(5) If the Regulator 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 employee, the Regulator must reduce the amount of the compensation by a proportion the Regulator considers just and equitable having regard to that finding.

(6) The Regulator must not consider any reference under this section, unless the reference was made within 3 months from the date of the employer's act or failure to act as referred to in subsection (1), or a further period the Regulator considers reasonable if satisfied that it was not reasonably practicable for the application to be made within the 3-month period.

## **CHAPTER V UNFAIR DISMISSAL**

### ***Part A Right not to be unfairly dismissed***

#### **Employee's right not to be unfairly dismissed**

31. (1) Subject to subsection (3), an employee has the right not to be unfairly dismissed by his or her employer.

(2) Any remedy for unfair dismissal available to an employee under this Part is in addition to any claim for wrongful dismissal that the employee may have.

(3) Subsection (1) applies in respect of any employee who has been continuously employed by the employer for a period of at least 12 months ending on the effective date of termination; but this requirement does not apply in the case of the dismissal of an employee referred to in Part C of this Chapter.

### **Meaning of dismissal**

- 32.** An employee is dismissed by his or her employer if—
- (a) the employment contract of an employee is terminated, with or without notice by the employer; or
  - (b) the employment contract of an employee is terminated by the employee in circumstances in which he or she is entitled to terminate it without notice because of the employer's conduct.

### **Effective date of termination**

- 33.** (1) Subject to subsection (2), “**effective date of termination**”—
- (a) in relation to an employee whose contract of employment is terminated by notice (whether given by the employer or by the employee) means the date on which the notice expires; and
  - (b) in relation to an employee whose contract of employment is terminated without notice means the date on which the termination takes effect.
- (2) If—
- (a) the contract of employment is terminated by the employer; and
  - (b) the notice period under the contract of employment or required under any regulations to be given by an employer would, if duly given on the material date, expire on a date later than the date determined under subsection (1),
- such later date is the effective date of termination.

## ***Part B*** ***Fairness of dismissal***

### **Fairness of dismissal**

- 34.** (1) If an employee alleges that he or she has been dismissed unfairly, it is for the employer to show that—
- (a) the principal reason for the dismissal is fair and of a kind such as to justify the dismissal of an employee holding the position which the employee held;
  - (b) based on the reason referred to in paragraph (a), the employer acted reasonably in dismissing the employee; and
  - (c) prior to the dismissal, the employer properly investigated the situation and followed all steps required by the disciplinary and grievance procedures applicable under section 21(1)(a).
- (2) Fair reasons for purposes of subsection (1)(a) include—
- (a) that the employee is not capable with reference to skill, aptitude, health or any other

physical or mental quality or does not possess the academic, technical or professional qualification required to perform work of the kind which he or she was employed by the employer to do;

- (b) that the conduct of the employee is unsatisfactory;
- (c) that the employee could not continue to work in the position which he or she held without contravening (either on his or her part or on that of the employer) a duty or restriction imposed by or under any law;
- (d) redundancy of the employee;
- (e) retirement of the employee in accordance with the provisions contained in the contract of employment; or
- (f) any other substantial reason, including expiry of a fixed term contract.

(3) Failure by the employer to follow or complete any procedures referred to in subsection (1)(c) means that the dismissal is unfair, unless the failure is caused, or substantially contributed to, by the employee's own conduct.

### **Gross misconduct of employee**

**35. (1)** Regardless of any minimum notice period required under the contract of employment or prescribed by regulations, an employer may, in the case of suspected gross misconduct by an employee, suspend the employment of the employee with immediate effect pending an investigation into the misconduct.

(2) If upon completion of the investigation into the misconduct, it is found that the employee's conduct constitutes gross misconduct, the employer may dismiss the employee with immediate effect.

(3) Gross misconduct for the purposes of this section includes, but is not limited to, theft, fraud or violent behaviour by the employee (whether in connection with his or her employment or otherwise).

### ***Part C***

#### ***Circumstances where dismissal may be unfair regardless of period of employment***

### **Asserting a statutory right**

**36.** Dismissal of an employee may be unfair regardless of the minimum period of employment referred to in section 31(3), if the sole or principal reason for the dismissal is that an action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing or otherwise securing the benefit of any statutory right of the employee under any legislation.

### **Health and safety**

**37. (1)** Dismissal of an employee may be unfair regardless of the minimum period of employment referred to in section 31(3), if the sole or principal reason for the dismissal is that—

- (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out, or proposed to carry out, such activities;

- (b) being a representative of workers on matters of health and safety at work or a member of a safety committee (in accordance with any law, or being acknowledged as such by the employer), the employee performed, or proposed to perform, any functions as such a representative or a member of such a committee;
- (c) being an employee at a place where there was no such representative or safety committee, or there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, the employee brought to his or her employer's attention, by reasonable means, circumstances connected with his or her work which the employee reasonably believed were harmful or potentially harmful to health or safety;
- (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which the employee could not reasonably have been expected to avert, the employee left or proposed to leave or, while the danger persisted, refused to return to his or her place of work or any dangerous part of his or her place of work; or
- (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, the employee took, or proposed to take, appropriate steps to protect himself or herself or other persons from the danger.

(2) For the purposes of subsection (1)(e), whether steps which an employee took, or proposed to take, were appropriate must be judged by reference to all the circumstances including, in particular, the employee's knowledge and the facilities and advice available to him or her at the time.

(3) If the sole or principal reason for the dismissal of an employee is that specified in subsection (1)(e), the employee is not to be regarded as unfairly dismissed if the employer shows that it was, or would have been, so negligent for the employee to take the steps which he or she took, or proposed to take, that a reasonable employer might have dismissed the employee for taking, or proposing to take, them.

### **Public interest disclosure**

**38.** Dismissal of an employee may be unfair regardless of the minimum period of employment referred to in section 31(3), if the sole or principal reason for the dismissal is the disclosure by the employee, in good faith, of concerns about any crime, civil offence (including negligence, breach of contract or breach of administrative law), miscarriages of justice, dangers to health and safety or the environment and the concealment of any of such activities in the work place, if the disclosure is made—

- (a) to his or her employer;
- (b) to some other person responsible for the malpractice;
- (c) to the person who appointed the employer as a contractor;
- (d) to a prescribed regulator;
- (e) in the course of obtaining legal advice; or
- (f) to the police, an elected member of the Legislative Council, the Governor, the Chief Secretary, the Financial Secretary or the Attorney General, but only if—
  - (i) the employee reasonably believed that he or she would be victimised if he or she raised the matter internally or with a prescribed regulator;
  - (ii) there was no prescribed regulator and he or she reasonably believed that the evidence was likely to be concealed or destroyed;
  - (iii) the concern had already been raised with the employer or a prescribed

- regulator; or  
 (iv) the concern was of an exceptionally serious nature.

### **Pregnancy, childbirth or maternity**

**39.** Dismissal of an employee may be unfair regardless of the minimum period of employment referred to in section 31(3), if the sole or principal reason for such dismissal relates to pregnancy, childbirth or maternity of the employee.

## ***Part D*** ***Remedies for Unfair Dismissal***

### **Interim order for payment of wages or salary**

**40. (1)** An employee who refers or intends to refer a claim for unfair dismissal under section 41 to the Regulator based on any reason referred to in section 36, 37, 38 or 39 may, within 7 days from the effective date of termination, apply to the Regulator for an interim order for his or her wages or salary to be continued, or re-commenced, and to be paid until the matter is finally determined, or for any shorter period the Regulator thinks fit.

**(2)** The Regulator may, if he or she thinks fit, in accordance with subsection (1), order the employer to continue to pay the employee, forthwith and from the effective date of termination, wages or salary at the same rate as the employee was paid at the effective date of termination. If the employee was not paid up to the effective date of termination the Regulator may make the order to run from the date to which the employee was paid.

### **Referral of claim for unfair dismissal to Regulator**

**41. (1)** An employee who claims to have been unfairly dismissed by his or her employer may refer the matter to the Regulator.

**(2)** The Regulator must determine the matter and if the Regulator finds in favour of the employee, he or she—

- (a)** must make a declaration to this effect;
- (b)** may make an award of compensation to be paid by the employer to the employee as provided for in section 44; and
- (c)** must order the employer to pay a financial penalty not exceeding £200.

**(3)** *Repealed*

**(4)** The Regulator must not consider any referral under this section unless it was made within 3 months from the effective date of termination, or a further period the Regulator considers reasonable if satisfied that it was not reasonably practicable for the application to be made within the 3- month period.

### **Order for reinstatement**

**42.** *Repealed*

### **Order for re-engagement**



**43. Repealed**

**Order for compensation**

**44. (1)** Compensation awarded by the Regulator under section 41(2)(b) may comprise—

- (a) a basic award calculated in the manner referred to in subsection (2) below; and
- (b) a compensatory award which the Regulator considers just and equitable in the circumstances of the dismissal and having regard to the loss suffered by the employee as a result of the unfair dismissal.

**(2)** The amount of the basic award referred to in subsection (1)(a) must be calculated by—

- (a) determining the number of years, ending with the effective date of termination, during which the employee was continuously employed by the employer; and
- (b) allowing for each of those years of employment—
  - (i) one and a half weeks' pay for every year of employment in which the employee was aged 41 years or older;
  - (ii) one week's pay for every year of employment (not falling within paragraph (i)) in which the employee was aged 22 years or older; and
  - (iii) half a week's pay for every year of employment that does not fall within paragraph (i) or (ii).

**(2A)** If the employee was continuously employed for more than 20 years, only the last 20 years of employment must be taken into account for purposes of determining the amount of the basic award under subsection (1).

**(3)** The amount of the basic award (before any reduction under subsection (4)) must not be more than £5,000 or an amount prescribed by regulations made by the Governor in Council.

**(4)** If the Regulator finds any factors exist that would justify ~~that~~ the amount of the basic award being reduced to any extent, the Regulator must reduce the amount of the basic award to an extent the Regulator considers just and equitable having regard to that finding.

**CHAPTER VI  
APPEAL AND ENFORCEMENT OF ORDERS**

*Part A  
Appeal against Regulator decision*

**Appeal against order relating to minimum wage**

**45. (1)** A person against whom an order is made under section 18 or 19 may appeal against the order to the Supreme Court within 30 days following the date of service of the notice.

**(1A)** An appeal under subsection (1) must be determined on the basis of written evidence (either sworn or unsworn) and submissions, produced and filed in a manner and form

prescribed by rules of court.

**(1B)** If the Chief Justice considers that an oral hearing is necessary in the interests of justice, the Chief Justice may order that a particular appeal must be dealt with at an oral hearing,

**(2)** On an appeal under subsection (1), the Supreme Court must not uphold the appeal, unless it is established with respect to the relevant order—

- (a)* that the facts are such that had the Regulator been aware of them, the Registrar would not reasonably have come to the conclusion giving rise to the order;
- (b)* if the order relates to 2 or more employees, that the facts are such that had the Regulator been aware of them, the Registrar would have had no reason to include some of the employees in the order against the appellant; or
- (c)* if the order imposes a requirement under section 18(2) in relation to an employee—
  - (i)* that no sum was due to the employee under section 16(1); or
  - (ii)* that the amount specified in the order as the sum due to the employee under that section is incorrect.

**(3)** The Supreme Court may uphold the decision of the Regulator or amend the decision and substitute its own decision, and costs will be at the discretion of the Court.

### **Appeal against order relating to other employee rights**

**46. (1)** An employer or an employee who is dissatisfied with the decision of the Regulator under section 15, 22, 26, 26B, 28, 30, 40(2) or 41 may appeal to the Supreme Court by giving notice in writing within 30 days from the date of the Regulator's order.

**(1A)** An appeal under this section must be determined on the basis of written evidence (either sworn or unsworn) and submissions, produced and filed in a manner and form prescribed by rules of court.

**(1B)** If the Chief Justice considers that an oral hearing is necessary in the interests of justice, the Chief Justice may order that a particular appeal must be dealt with at an oral hearing,

**(2)** The Supreme Court may uphold the decision of the Regulator or amend the decision and substitute its own decision, and costs will be at the discretion of the Court.

**(3)** In amending the decision of the Regulator, the Supreme Court may impose a financial penalty upon an employer not exceeding £400.

## ***Part B*** ***Enforcement of Orders***

### **Enforcement of Regulator's orders**

**47. (1)** Subject to any right of appeal against an order by the Regulator, any amount payable under such order is, if not paid within the period prescribed in the notice (or if no such period is prescribed within 30 days from the date of the notice) recoverable by execution issued from the Magistrates' Court as if it were payable under an order of that court.

(2) A person who fails to comply with an order of the Regulator under section 18(2)(a), 19(2)(b), 22(2)(a), 26(2)(a), 26B(3)(b) or 28(2)(a) or 41(2)(a) commits an offence.

Penalty: A fine of £3,000.

(3) If any such offence committed by a corporate body is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any person who is a director, manager, secretary or other similar officer of the body corporate, or who purports to act in any such capacity, that person as well as the body corporate commits that offence and is liable to be proceeded against accordingly.

### **Financial penalties**

**48. (1)** The imposition of any financial penalty under Chapter III, IV, V or VI is not a criminal conviction, and such penalty is not a fine.

(2) Every financial penalty must, unless otherwise provided under this Ordinance, be paid to the Clerk of the Peace within 30 days from the date on which it is imposed and must be accounted for by the Clerk of the Peace as if it were a fine.

(3) If a financial penalty is not paid in accordance with subsection (2), the person who is liable to pay it commits an offence.

Penalty: A fine of 20 times the amount of the financial penalty.

(4) If a fine is imposed under subsection (3), the financial penalty is thereby discharged.

(5) If under this Ordinance the Regulator receives any sum by way of a financial penalty, it must as soon as possible be paid into the Consolidated Fund.

## **CHAPTER VII MISCELLANEOUS**

### **Regulations**

**49. (1)** The Governor in Council may make regulations generally for carrying into effect the provisions of this Ordinance.

(2) Without limiting subsection (1), regulations may provide for—

- (a) forms to be used, fees to be paid, and procedures to be adopted for or in connection with the operation of this Ordinance;
- (b) matters which are specially mentioned in this Ordinance as being matters which may be prescribed by regulations;
- (c) the minimum period of notice to be given by employer on termination of the employment contract of an employee;
- (d) circumstances in which, or persons to whom, the provisions of this Ordinance do not apply, either generally or subject to prescribed conditions; and
- (e) generally for carrying out the objects and provisions of this Chapter.

## Repeal and amendment of legislation

### 50. *Omitted*

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## EMPLOYMENT RIGHTS ORDINANCE, 2010

### EMPLOYMENT RIGHTS (LABOUR REGULATING AUTHORITY) REGULATIONS, 2013 (Section 49)

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#### **Citation, commencement and application**

**1. (1)** These Regulations may be cited as the Employment Rights (Labour Regulating Authority) Regulations, 2013, and come into force on the date that Chapter II of the Ordinance comes into force.

**(2)** These Regulations apply to all proceedings of the Labour Regulating Authority under the Employment Rights Ordinance, 2010.

#### **Employer's grievance procedure**

**2. (1)** The employee must, unless the Regulator otherwise directs, follow the employer's grievance procedure (if any) before the Regulator must proceed to consider a complaint or claim.

**(2)** If a complaint or claim is made to the employer and submitted to the Regulator simultaneously, the Regulator must not proceed to consider the complaint or claim until the employer has first had a period of 14 days to resolve the complaint or claim under the employer's grievance procedure.

**(3)** If an employee is not satisfied with the employer's response to his or her complaint or claim, or the employer has not responded within 14 days of the making of such complaint or claim, the complaint or claim must be considered by the Regulator.

### **Form of complaint or claim and response**

**3. (1)** A complaint or claim and response must be submitted in writing; but if the Regulator so directs, the Regulator, or any other person the regulator directs, must reduce any verbal complaint or claim or response to writing.

**(2)** The Regulator must, subject to the proviso in paragraph (1), only consider a complaint or claim or response if it is submitted in the form set out in Schedule 1 to these Regulations.

**(3)** The Regulator must, after considering all relevant factors (including the employee's or employer's explanation for any delay in submitting the complaint or claim or response), refuse to consider a complaint or claim or response if it appears not to have been submitted to the Regulator within the prescribed time limit for doing so.

- (4)** A complaint or claim and response must include, where applicable and known—
- (a)* the employee's and employer's full contact details (including e-mail address where appropriate);
  - (b)* any representative's full contact details (including e-mail address where appropriate);
  - (c)* the particular complaint or claim made by the employee;
  - (d)* the number of persons employed by the employer;
  - (e)* the date when the employee's employment commenced;
  - (f)* the date when employee's employment ended;
  - (g)* the job title held by the employee;
  - (h)* the number of hours on average worked each week by the employee;
  - (i)* the normal amount of remuneration before and after taxation received by the employee;
  - (j)* the period of notice worked by the employee;
  - (k)* whether the employee was in an employer's pension scheme;
  - (l)* any other benefits received by the employee;
  - (m)* any new job obtained by the employee including the start date and remuneration;
  - (n)* the remedies sought by the employee including an interim order and whether the employer resists them;
  - (o)* the dates of incidents or periods covered, background and details giving rise to the complaint or claim and the employer's response to them;
  - (p)* whether the complaint or claim is one of a number of complaints or claims arising from the same or similar complaints or claims against the same employer;
  - (q)* whether (and, if so, when) the employee has already made a complaint or claim to the employer (and details of it);
  - (r)* without prejudice to any further material or evidence that may be allowed by the Regulator, any supporting material or evidence which the employee or employer considers relevant to the substance of the complaint or claim or response;
  - (s)* any explanation for the complaint or claim or response not being made within a prescribed time limit; and
  - (t)* any connected proceedings, for wrongful dismissal or otherwise, in a court of law in St Helena or elsewhere.

### **Procedure after receipt of complaint or claim**

4. (1) The Regulator must copy to the employer the complaint or claim form, and require the employer to respond to it within 14 days.

(2) The Regulator may require the employee or employer to clarify any ambiguity in the complaint or claim or any response to it and invite the employee or employer to comment upon any information received from the employer or employee, within 14 days of such request.

(3) On receipt of any comments or responses from the employee or employer at any stage in the proceedings, the Regulator must provide copies of these to all other parties.

### **Decision of Regulator**

5. (1) The Regulator, on being satisfied that all preliminary inquiries have been completed, may dismiss all, or part only, of a complaint or claim or response and proceed to dispose of the complaint and claim or response, or part of it, not so dismissed.

(2) If facts become apparent to the Regulator in the course of proceedings, such that in the opinion of the Regulator these Regulations would have had effect otherwise if such facts had been known at a previous time, the Regulator may cease to proceed with proceedings whether by a stay or dismissal of all or part of the complaint or claim or response.

(3) If it appears to the Regulator that the matter complained of is the subject of proceedings in a court of law in St Helena or that the matter complained of is a matter in respect of which the employee has a remedy by way of proceedings in a court of law in St Helena, and that in the particular circumstances it is not appropriate for the Regulator to consider a complaint or claim, the Regulator may dismiss or stay any proceedings until a time the Regulator directs.

(4) The Regulator must provide the employee and the employer with a copy of any decision under this regulation.

### **Hearings on disputed fact or law**

6. (1) The Regulator must, unless all parties agree that the Regulator can determine the matter on written submissions, convene a hearing or hearings in relation to all or any part of a complaint or claim or response so as to consider part or all of any matter of law or fact in dispute.

(2) The Regulator must give at least 14 days' notice to the parties of a hearing, unless all parties agree to a shorter period of notice.

(3) At a hearing the employee and employer, or their authorised representatives, must be given an opportunity to attend, to call witnesses with the permission of the Regulator, and to make representations.

(4) Evidence given by a witness at any hearing must be on oath or affirmation of that witness, unless the Regulator otherwise directs.

### **Procedural orders of Regulator**

7. The Regulator may, at any time, on the Regulator's own initiative or on the application of any party, make any orders that are necessary or reasonable in all matters relating to—

- (a) admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) joinder or separation of complaints or claims, employees or employers;
- (c) adding or removing parties to the complaint or claim or response;
- (d) amendment of a complaint or claim or response;
- (e) issuing of summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- (f) proving any fact by affidavit;
- (g) such other procedural orders as may be made by the Magistrates' Court.

### **Issue of findings**

8. Once the Regulator has heard or received all evidence and representations from the parties, the Regulator must issue his or her findings setting out whether the complaint or claim or response is upheld, not upheld, or upheld in part, and any further particulars, orders or recommendations provided for in the Ordinance.

### **Recall of decision**

9. (1) An employer or employee may, within a reasonable time after becoming aware of any decision, apply to the Regulator to recall the decision if either party did not receive notice of the decision through no fault of its own, notwithstanding the methods of service prescribed by these regulations.

(1A) No such application may be made after one year from the date of the decision sought to be recalled.

(2) A copy of the application filed under paragraph (1) must be served on the other party.

(3) The Regulator may, on considering the application at a hearing, recall the decision subject to any order the Regulator thinks fit to make and the complaint or claim must thereafter proceed as if such decision and any subsequent decisions relating to it had not been made.

### **Service on parties**

10. Service of any document on any person as provided for in these Regulations or the Ordinance must be made as provided for in the Civil Procedure Ordinance, 1968 and may be carried out by e-mail or fax.

### **Departure from procedures and time limits**

11. (1) The Regulator may, subject to any express provisions contained in the Ordinance, direct that there be a departure from the procedures in any material respect or amend or adapt any time limits in these Regulations in a particular case for reasons of fairness or in

order for the Regulator properly to consider a complaint or claim or response:

(2) The Regulator must canvass any departure from the procedures under paragraph (1) with the parties, setting out the nature and extent of such departure and the reasons for doing so and seeking the relevant party's response.

(3) Any party seeking an extension of a time limit under paragraph (1) must apply to the Regulator in writing and if the Regulator is satisfied that it was not reasonably practicable for a complaint or claim or response of any nature to be presented within the prescribed period, the regulator must extend the time limit subject to such order as he or she thinks fit.

**SCHEDULE 1**  
(Regulation 3(2))

**LABOUR REGULATING AUTHORITY**

**COMPLAINT OR CLAIM FORM**

**1. Employee**

1.1 Title	
1.2 First Name(s)	
1.3 Surname	
1.4 Address	
1.5 Telephone	
1.6 Fax	
1.7 E-mail	

**2. Employer**

2.1 Title (if applicable)	
2.2 First Name(s) (if applicable)	
2.3 Surname/Business Name	



2.4 Address	
2.5 Telephone	
2.6 Fax	
2.7 E-mail	

**3. Employee's representative (if any)**

3.1 Title	
3.2 First Name(s)	
3.3 Surname	
3.4 Address	
3.5 Telephone	
3.6 Fax	
3.7 E-mail	

**4 Particular complaint or claim**

	Tick if applicable
Failure to provide statements (section 18)	
Failure to allow access to records (section 18)	
Failure to pay at least minimum wage (section 19)	
Failure to provide statement of employment particulars (section 22)	

Deduction or requiring payment (section 26)	
Failure to remunerate equally (section 26B)	
Working hours or leave period (section 28)	
Detriment (section 30)	
Unfair dismissal (section 41)	

**5 Number of persons employed by employer (if known)**

**6 Date when employment commenced**

**7 Date when employment ended (if applicable)**

**8 Job title**

**9 Number of hours on average worked each week**

**10 Normal amount of remuneration**

<b>Before taxation:</b>
<b>After taxation:</b>

**11 Period of notice worked**

--

**12 Details of employee's membership of employer's pension scheme**

--

**13 Any other benefits received**

--

**14 New job (if applicable)**

<b>Start date:</b>
<b>Remuneration:</b>

**15 Remedies sought**

	Tick if applicable
Order to provide statements (section 18)	
Compensation for failure to allow access to records (section 18)	
Order for payment and compensation relating to minimum wage (section 19)	
Order to provide statement of employment particulars and compensation (section 22)	
Order for payment and compensation relating to deduction or requiring payment (section 26)	
Order for payment and compensation relating to equal pay (section 26B)	
Compensation relating to working hours or leave periods (section 28)	

Compensation relating to detriment (section 30)	
Interim order for payment of salary relating to unfair dismissal (section 40)	
Compensation for unfair dismissal (sections 41 and 44)	

**16 Date of incident or periods covered**

--

**17 Background and details giving rise to complaint or claim**

(continue on separate sheet if necessary)
---

**18 Same or similar complaints or claims against the same employer, if so give details (if known)**

--

**19 Details of complaint or claim made directly to the Employer**

Date:
Details:

**20 List supporting material relevant to complaint or claim**

--

**21 Explanation for complaint or claim being outwith the prescribed time limit**

--

**22 Connected proceedings for wrongful dismissal or otherwise in a court in St Helena or elsewhere**

--

**23 Declaration**

<p>I understand that on receipt of this complaint or claim the Regulator will provide a copy of this form and any accompanying information to the Employer.</p> <p>I understand that the proceedings in relation to this complaint or claim fall under the Regulator’s jurisdiction and undertake to abide by all the Regulator’s directions and orders</p> <p>Signature of employee/ representative .....</p> <p>Date of complaint or claim .....</p>
--

Return to: The Labour Regulating Authority, The Castle, Jamestown, St Helena STHL 1ZZ  
 Telephone Tel: +290 2340 Fax: +290 2598 E-mail: [judicial.manager@sainthelena.gov.sh](mailto:judicial.manager@sainthelena.gov.sh)

**LABOUR REGULATING AUTHORITY**

**RESPONSE FORM**

**1. Employer**

1.1 Title	
1.2 First Name(s)	
1.3 Surname	
1.4 Address	
1.5 Telephone	

1.6 Fax	
1.7 Email	

## 2. Employee

2.1 Title (if applicable)	
2.2 First Name(s) (if applicable)	
2.3 Surname/Business Name	
2.4 Address	
2.5 Telephone	
2.6 Fax	
2.7 E-mail	

## 3. Employer's representative (if any)

3.1 Title	
3.2 First Name(s)	
3.3 Surname	
3.4 Address	
3.5 Telephone	
3.6 Fax	
3.7 E-mail	

**4. Particular complaint or claim**

<b>Do you resist any of the complaints or claims?</b>	<b>YES/NO/ NA</b>
Failure to provide statements (section 18)	
Failure to allow access to records (section 18)	
Failure to pay at least minimum wage (section 19)	
Failure to provide statement of employment particulars (section 22)	
Deduction or requiring payment (section 26)	
Failure to remunerate equally (section 26B)	
Working hours or leave period (section 28)	
Detriment (section 30)	
Interim Order for payment of wages or salary (section 40)	
Unfair dismissal (section 41)	

**5. Number of persons employed by employer**

**6. Date when employment commenced**

**7. Date when employment ended (if applicable)**

**8. Job title**

--

**9. Number of hours on average worked each week**

--

**10. Normal amount of remuneration**

<b>Before taxation:</b>
<b>After taxation:</b>

**11. Period of notice worked**

--

**12. Details of employee's membership of employer's pension scheme**

--

**13. Any other benefits received**

--

**14. New job (if applicable)**

Do you accept what is claimed by the employee? YES/NO/NA If not detail below.

<b>Start date (if known):</b>
<b>Remuneration (if known):</b>



**15. Remedies sought**

<b>Do you resist any of the remedies sought?</b>	<b>YES/NO/NA</b>
Order to provide statements (section 18)	
Compensation for failure to allow access to records (section 18)	
Order for payment and compensation relating to minimum wage (section 19)	
Order to provide statement of employment particulars and compensation (section 22)	
Order for payment and compensation relating to deduction or requiring payment (section 26)	
Order for payment and compensation relating to equal pay (section 26B)	
Compensation relating to working hours or leave periods (section 28)	
Compensation relating to detriment (section 30)	
Interim order for payment of salary relating to unfair dismissal (section 40)	
Compensation for unfair dismissal (sections 41 and 44)	

**16. Date of incident or periods covered**

Do you accept the date of the incident or periods covered as claimed by the employee?

YES/NO

If not detail below.

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**17. Response to background and details giving rise to complaint or claim**

(continue on separate sheet if necessary)
---

**18. Same or similar complaints or claims against you previously? If so give details (if known)**

--

**19. Details of any complaint or claim ~~to~~ made directly to you**

Date:
Details:

**20. List supporting material relevant to the response to the complaint or claim**

--

**21. Explanation for response being outside the prescribed time limit**

--

**22. Connected proceedings for wrongful dismissal or otherwise in a court in St Helena or elsewhere**

--

## 23. Declaration

I/We understand that on receipt of this response the Regulator will provide a copy of this form and any accompanying information to the Employee.

I/We understand that the proceedings in relation to this complaint or claim fall under the Regulator's jurisdiction and undertake to abide by all the Regulator's directions and orders.

Signature of employer/ representative .....

Date of response.....

Return to: The Labour Regulating Authority, The Castle, Jamestown, St Helena STHL 1ZZ  
Telephone Tel: +290 2340 Fax: +290 2598 E-mail: [judicial.manager@sainthelena.gov.sh](mailto:judicial.manager@sainthelena.gov.sh)

## EMPLOYMENT RIGHTS ORDINANCE, 2010

### EMPLOYMENT RIGHTS (MINIMUM WAGE) REGULATIONS, 2013

(Sections 11 and 49)

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#### Citation and commencement

1. These Regulations may be cited as the Employment Rights (Minimum Wage) Regulations, 2013 and come into force on 1st June 2013.

#### Determination of minimum wage

2. *Revoked by Legal Notice 8 of 2018*

#### Pay interval

3.<sup>6</sup> The pay interval for purposes of these regulations is one calendar month, or in the case of an employee who is paid in accordance with his or her contract of employment by

<sup>6</sup> Regulation 3 substituted by L.N. 8/2018

reference to a shorter period than one calendar month, that shorter period.

### **Exclusions from minimum wage**

#### **4. *Revoked by Legal Notice 8 of 2018***

### **Payments to be excluded from calculation**

**5.** Payments and other matters not to be included in the calculation of the minimum wage are—

- (a) payment of expenses actually and reasonably incurred in the performance of the employee's duties;
- (b) rest periods whether the time is spent resting at work or not;
- (c) payments in kind including meals and whether of monetary value or not, except living accommodation.
- (d) remuneration from commission, bonuses or tips.

### **Determination of hourly rate**

**6.<sup>7</sup> (1)** The hourly rate paid to an employee is to be determined by dividing the amount (whether for output or otherwise) of remuneration paid to the employee by the total hours actually worked in the pay interval.

**(1A)** In any calculation under sub-regulation (1) that shows payments of less than the minimum wage the employer will be regarded as having paid the minimum wage if the employer can show that within one calendar month of the end, or within one calendar month prior to the beginning of the pay interval, the employer made payments to the employee for work performed during the pay interval which when added to the other remuneration paid for work undertaken during the pay interval shows that the employer paid the employee at a rate at least equivalent to the then applicable minimum wage rate.

**(2)** Hours actually worked includes hours when the employee attended at work under the contract of employment even if no work was undertaken because the employer did not supply him or her with work to undertake.

**(3)** Work includes compulsory training provided by the employer which is incidental to the actual work undertaken under the employee's contract of employment.

**(4)** The applicable minimum wage rate is the minimum wage rate applying at the start of the pay interval.

### **Records**

**7.<sup>8</sup> (1)** If the contract of employment requires submission to the employer of a record of hours worked, no minimum wage assessment is to be made by the Labour Regulating Authority until such a record has been submitted to the employer. If such a record is required for a pay interval the employer must pay the employee within that pay interval or within one calendar month of the end of the pay interval for which the record was submitted.

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<sup>7</sup> Regulation 6 amended by L.N. 8/2018

<sup>8</sup> Regulation 7 amended by L.N. 8/2018

(2) Every employer employing a person who qualifies for the minimum wage must keep in respect of such person records sufficient to establish that the employer is remunerating that person at a rate at least equal to the minimum wage rate.

### **Remuneration**

- 8.<sup>9</sup>** (1) The amount of remuneration must include as if not deducted—
- (a) any deduction that the employer is obliged to deduct under law or any order of any court or that the employer is lawfully entitled to make whether under the contract of employment or otherwise;
  - (b) any deduction made as a result of advance payment of wages or salary or as a result of a loan agreement with the employee;
  - (c) a deduction made to cover accidental overpayment of wages or salary if such deduction is otherwise lawful.

(2) An employee whose contract of employment includes the provision of living accommodation is entitled to be paid at the minimum wage rate but in any calculation of the hourly wage rate paid, the total remuneration may include the cost of any accommodation supplied to the employee up to a maximum of £5 per day, during the pay interval.

### **Disputes**

**9.<sup>10</sup>** Any dispute between the parties relating to the number of hours worked during the pay interval may be determined by the Labour Regulating Authority as a matter of fact.

### **Interpretation**

**10.** For the purposes of these Regulations, living accommodation is only provided on days when it is provided for a whole day from midnight to midnight.

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## **EMPLOYMENT RIGHTS ORDINANCE, 2010**

### **EMPLOYMENT RIGHTS (LEAVE ENTITLEMENT) REGULATIONS, 2015** (Sections 27 and 49)

### **Citation and commencement**

**1.<sup>11</sup>** (1) These Regulations may be cited as the Employment Rights (Leave Entitlement) Regulations, 2015.

(2) These Regulations come into force on 1st April 2015 and apply in respect of annual leave cycles commencing on or after that date.

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<sup>9</sup> Regulation 8 amended by L.N. 8/2018

<sup>10</sup> Regulation 9 amended by L.N. 8/2018

<sup>11</sup> Regulation 1 amended by L.N. 1/2020

## Interpretation

2. In these Regulations, “**annual leave cycle**” means any period of 12 months in respect of which an employee’s annual leave entitlement is determined under his or her employment contract.

## Minimum period of paid leave

3. (1) An employee is during each annual leave cycle entitled to—
- (a) a minimum of 5 days paid annual leave; and
  - (b) up to five days paid sick leave.

(2) If an employee is employed by an employer for a period of less than 12 months during any annual leave cycle, the number of days referred to in subsection (1) must be apportioned accordingly.

## Maternity, parental and adoption leave entitlement

4.<sup>12</sup> (1) A female employee is entitled to 14 weeks maternity leave which may be taken at any time during the period commencing 3 months before her expected date of delivery of the child and ending one year after the date of the child’s birth.

(2) An employee intending to take maternity leave must no later than 28 days before the date on which her maternity leave starts, or as soon as reasonably possible, notify her employer of— (a) her pregnancy and the expected week of childbirth; and (b) the date on which she so intends her maternity leave to start.

(3) Four weeks of the leave under sub-regulation (1) must be on full pay if the employee has been continuously employed by the employer for a period of at least 26 weeks on the date on which the maternity leave starts or the date of the child’s birth, whichever is earlier.

(4) An employee on leave under sub-regulation (1) may, at least 28 days before the expected date of return from such leave, request additional maternity leave or request to return to work on a part time basis.

- (5) An employee is entitled to 2 weeks parental leave if that employee is either—
- (a) the father of the child and has, or expects to have, responsibility for the upbringing of the child; or
  - (b) the spouse or life partner of the child's mother and not the child's father, but who has, or expects to have, the main responsibility (in addition to the responsibility of the mother) for the upbringing of the child.

- (6) Parental leave under sub-regulation (5)—
- (a) may be taken at any time during the period commencing 3 months before the expected date of the child’s birth and ending one year after the date of the child’s birth; and
  - (b) must be on full pay if the employee has been continuously employed by the

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<sup>12</sup> Regulation 4 added by L.N. 1/2020

employer for a period of at least 26 weeks on the date on which the parental leave starts or the date of the child's birth, whichever is earlier.

**(7)** An employee intending to take parental leave referred to in sub-regulation (5) must no later than 28 days before the date on which the parental leave starts, or as soon as reasonably possible, notify his or her employer of the date on which that employee so intends such leave to start.

**(8)** An employee on parental leave under sub-regulation (5) may, at least 10 days before the expected date of return of that employee from such leave, request additional parental leave or request to return to work on a part time basis.

**(9)** An employee is entitled to 2 weeks adoption leave which may be taken at any time during the period commencing 3 months before the date on which the employee is notified under the Welfare of Children Ordinance, 2008, that a child is to be, or expected to be, placed with the employee and ending one year after the date on which the child is placed with the employee for adoption.

**(10)** The provisions of sub-regulation (9) apply in the same manner to an employee who is the spouse or life partner of the child's adopting parent referred to in that sub-regulation and who has, or expects to have, the main responsibility (in addition to the responsibility of the adopting parent) for the upbringing of the child.

**(11)** An employee intending to take adoption leave referred to in sub-regulation (9) must no later than 28 days before the date on which the adoption leave starts, or as soon as reasonably possible, notify his or her employer of the date on which that employee so intends such leave to start.

**(12)** Adoption leave under sub-regulation (9) must be on full pay if the employee has been continuously employed by the employer for a period of at least 26 weeks on the date on which the adoption leave starts or the date on which the child is placed with the employee, whichever is earlier.

**(13)** An employee on adoption leave under sub-regulation (9) may, at least 10 days before the expected date of return of that employee from such leave, request additional adoption leave or request to return to work on a part time basis.

**(14)** An employee's entitlement to leave under this regulation is not affected—

- (a)* by the birth, or expected birth, of more than one child as a result of the same pregnancy; or
  - (b)* if the child was stillborn after 24 weeks of pregnancy or has died.
-