



ST. HELENA

(Chapter No. not allocated yet)

EMPLOYMENT RIGHTS ORDINANCE

(Partly in force)

Non-authoritative Consolidated Text

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Whilst it is intended that this version accurately reflects the current law, users should refer to the authoritative texts in case of doubt. Enquiries may be addressed to the Attorney General at Essex House, Jamestown [Telephone (+290) 2270; Fax (+290) 2454; email pa.lawofficers@legalandlands.gov.sh]¹

Visit our [LAWS page](#) to understand the St. Helena legal system and the legal status of this version of the Ordinance.

This version contains a consolidation of the following laws—

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Ordinance 9 of 2010 ... in force on ...1 August 2012 (In Part)

¹ These contact details may change during 2011 or early in 2012. In case of difficulty, email shgwebsite@sainthelena.gov.sh or telephone (+290) 2470.

EMPLOYMENT RIGHTS ORDINANCE

(Ordinance 9 of 2010)

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 PURPOSES CONNECTED THEREWITH OR INCIDENTAL THERETO.

Commencement

[1 August 2012 (In Part)²]

**CHAPTER I
PRELIMINARY AND INTERPRETATION****Citation and commencement**

1. (1) This Ordinance may be cited as the Employment Rights Ordinance, 2010.
- (2) This Ordinance shall come into force on such date as the Governor may appoint 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 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 under 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**” shall 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,

² Sections 7 to 10 brought into force on 1 August 2012 by L.N. 22 of 2012

- 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 appointed under section 3(2);
- “remuneration”** means any sum payable to the employee in connection with his employment, including any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, but does not include—
- (a) any payment by way of an advance under an agreement for a loan;
 - (b) any payment in respect of expenses incurred by the employee in carrying out his employment;
 - (c) any payment to the employee otherwise than in his capacity as an employee .

CHAPTER II LABOUR REGULATING AUTHORITY

Labour Regulating Authority

3. (1) The Governor shall appoint a person to be the Labour Regulating Authority, who shall have such powers and functions as are conferred or imposed by this or any other Ordinance.

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

Duties of Labour Regulating Authority

- 4.** It shall be 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 all—
- (a) employees who are above compulsory school age, as described in section 34 of the Education Ordinance, 2008; and
 - (b) 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 shall have effect as if an employment contract for doing the relevant work was entered into between the agency worker and—

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- (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 works 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, where such 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 employment (apart from this Chapter), he 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 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 subsistence or such accommodation as 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. (1) There is hereby constituted a committee to be known as the Employment Rights Committee, to discharge the functions conferred upon it by this Part.

(2) The Committee shall consist of five members appointed by the Governor, and shall 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 who the Governor deems suitable to serve on the Committee.

Functions of Committee

8. (1) The Committee shall, 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 shall 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) shall be made at least three months before the expiry of the current pay reference period.

(3) The Committee shall, upon request of the Governor in Council or a Council Committee, make recommendations to the Governor in Council with respect to such rights as are referred to under section 27.

Matters to be considered by Committee

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

- (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 shall be in the form of reports to the Governor in Council and such reports shall—

- (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 shall 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 shall be such single hourly rate as the Governor in Council may from time to time prescribe 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 shall, 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 shall lay a report before the Legislative Council which shall 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 under section 10 within the period required 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, they shall 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

13. (1) Every employer shall remunerate each employee in respect of his 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 rights or instituting any proceedings under this Chapter.

Employer to provide worker with statement

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

- (a)** the name of the employee and employer;
- (b)** date that the employment of the employee started with such employer;

- (c) where such employee is paid at an hourly rate or payment of remuneration is determined with reference to the number of hours worked, the hours that such 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) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment;
- (h) such other information as may be prescribed by the Governor in Council by regulation.

Duty of employers to keep records

15. (1) Every employer shall keep records of payments made to its employees in such form and manner as may be prescribed by the Governor in Council by regulation.

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

(3) The Regulator may, by giving seven days' written notice, require an employer to produce to the Regulator the records kept by him 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, he shall investigate the matter and if he determines that such records are not being kept, or such records have not been produced to him as required by notice under subsection (3), he—

- (a) shall order such employer to keep records in respect of any future payments made to employees as required by subsection (1); and
- (b) may order such 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 employer at a rate which is less than the minimum wage, the employee shall be deemed to be entitled under his 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 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 shall 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 is being or may be, or has or may at any time during any immediately preceding period of 12 months have been, remunerated by his employer at a rate which is less than the minimum wage, he may require

his 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 employer at a rate which is less than the minimum wage and are exercisable—

- (a) by the employee alone; or
- (b) by the employee accompanied by such other person as the employee may think fit.

(3) In order to exercise any right under subsection (1), the employee shall give notice to his employer requesting the production of any relevant records relating to such period as may be 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) Where notice is given under subsection (3), the employer shall 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) such other place as may be 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 such later time as may be 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 shall investigate the complaint and, where he thinks fit, may serve a notice on the employer ordering such employer—

- (a) in the case of failure to provide any statement under section 14, to provide such statement within such time as may be 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) The Regulator shall not consider a complaint under this section unless it is presented to the Regulator before the expiry of the period of three 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:

Provided that the Regulator may consider the complaint if it is presented within such further period as it 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 shall not relieve such employer from the liability to provide access to records and shall for the purposes of this section be deemed to be failure by such 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 rights under section 17, is of the opinion that he has for any period not been remunerated by his employer at a rate at least equal to the minimum wage, he may lodge a complaint with the Regulator—

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

(2) The Regulator shall investigate the complaint and, where he thinks fit, may serve a notice on the employer ordering such employer—

- (a) to pay to the employee within such time as may be 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 per cent of the amount referred to in paragraph (a) in respect of all employees to whom the order relates, provided that such financial penalty shall not be more than £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), such amount (not exceeding £200) as the Regulator considers appropriate in the circumstances to compensate the employee for any financial loss or inconvenience sustained by him which is attributable to the underpayment or the exercise of his 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, such employer shall be 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 shall, when an employee begins employment with such employer, give to the employee a written statement of particulars of employment.

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

(3) The statement shall contain particulars of—

- (a) the names of the employer and employee;
- (b) the date when the employment began;

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- (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, where 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 he is employed to do or a brief description of the work for which he is employed;
- (f) where 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) pensions and pension schemes;
- (n) the length of notice which the employee is obliged to give and entitled to receive to terminate his 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) where the employee is required to work outside St Helena for a period of more than one month—
 - (i) the period for which he is to work outside St Helena;
 - (ii) the currency in which remuneration is to be paid while he is working outside St Helena;
 - (iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside St Helena; and
 - (iv) any terms and conditions relating to his return to St Helena;
- (t) such other information as may be prescribed by the Governor in Council by regulation.

(4) Where an employee's employment with his employer began before the date on which this section came into force, and the employee was not, at the time he so began, or at any stage thereafter, given a written statement of particulars, which complies with the requirements of this section, the employer shall give such a statement to the employee, within six months from the date of commencement of this section.

(5) This section does not apply in respect of any employer and its employees where such employer does not at any time have more than two employees in his employment.

Information on disciplinary and grievance procedures

- 21. (1)** The statement of particulars under section 20 shall 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;
 - (ii) a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his employment; and
 - (iii) the manner in which any such application should be made; and
- (c) where 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 had less than ten employees in his employment but will apply from any date thereafter that the employer has ten or more employees in his employment.

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 shall investigate the complaint and if he finds that an employer has failed to comply with sections 20 or 21, he shall serve a notice on the employer ordering such employer —

- (a) to provide a written statement complying with such sections within seven days;
- (b) to 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 such amount (not exceeding £200) as the Regulator considers appropriate in the circumstances to compensate the employee for any financial loss or inconvenience sustained by him which is attributable to the failure to provide the written statement or full particulars.

(4) Where 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, either the employer or the employee may refer the matter to the Regulator and the Regulator shall, 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 shall not determine any question with respect to the accuracy of any amount stated in the statement provided.

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

Part B

Protection of Remuneration

Right not to suffer unauthorised deductions

23. (1) An employer shall 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; or

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- (b) the employee has previously signified in writing his agreement or consent to the making of the deduction; or
- (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 court or tribunal requiring the payment of an amount by the employee.

(2) Where 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 shall for purposes of this Part be deemed to be a deduction made by the employer from the employee's remuneration:

Provided that this subsection does not apply in so far as the deficiency is attributable to an error on the part of the employer affecting the computation by him 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 shall not receive any payment from an employee employed by him 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 agreement or consent to the making of the payment.

(2) Any reference in this Part to an employer receiving a payment from an employee employed by him is a reference to his receiving such a payment in his 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 employer, the amount of the employee's remuneration, or any part thereof, is or may be determined by reference to the incidence of cash shortages or stock deficiencies.

(2) Where 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 him on that day shall be 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 him to such 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 shall not be an unauthorised deduction under section 24.

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

the amount or aggregate amount of the deduction or deductions on any pay day shall not exceed one-tenth of the gross amount of the remuneration payable to the employee on that day:

Provided that where the employee ceases to be employed by the employer, such employer may deduct the full outstanding amount from any payment made to such employee on or after termination of his 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 he 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 shall investigate the complaint and if he 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 shall serve a notice on the employer ordering such employer —

- (a) to pay to the employee a sum not exceeding the aggregate 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), such amount (not exceeding £200) as the Regulator considers appropriate in the circumstances to compensate the employee for any financial loss or inconvenience sustained by him which is attributable to the deduction or payment required from the employee.

(4) The Regulator shall not consider any reference under this section, unless the reference was made within three 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 such further period as the Regulator considers reasonable if he is satisfied that it was not reasonably practicable for the application to be made within such three month period.

Part C

Work times and leave entitlement

Working hours and leave periods

27. Subject to a request being made by 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;

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- (g) the right to paid or unpaid sick leave;
- (h) the circumstances under which an employer shall permit an employee to take time 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 or paternity leave, and in this section "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 shall investigate the complaint and where he thinks fit, he may serve a notice on the employer ordering such employer—

- (a) to pay to the employee such amount of compensation which 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) to pay a financial penalty not exceeding £200.

(3) The Regulator shall not consider any reference under this section, unless the reference was made within three months from the date of failure by the employer to comply with the regulations, or such further period as the Regulator considers reasonable if he is satisfied that it was not reasonably practicable for the application to be made within such three 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 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 where 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 shall investigate the complaint and where he thinks fit, he may serve a notice on the employer ordering such 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 shall 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 shall 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 he might reasonably be expected to have had but for that act or failure to act.

(5) Where 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, he shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

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

(2) Any remedy for unfair dismissal available to an employee under this Part is in addition to any claim for wrongful dismissal that such 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 twelve months ending on the effective date of termination:

Provided that the twelve month continuous employment requirement shall not apply in the case of the dismissal of an employee referred to in Part C.

Meaning of dismissal

32. An employee is dismissed by his employer if—

- (a)** the employment contract of an employee is terminated, with or without notice by his employer; or

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- (b) the employment contract of an employee is terminated by the employee in circumstances in which he is entitled to terminate it without notice by reason 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 his 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)** Where—
- (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 shall be the effective date of termination.

Part B

Fairness of dismissal

Fairness of dismissal

- 34. (1)** Where an employee alleges that he 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), such employer acted reasonably in dismissing the employee; and
 - (c) prior to such 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 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 held without contravening (either on his part or on that of his 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) shall result in such dismissal being unfair.

Gross misconduct of employee

35. (1) Notwithstanding any minimum notice period required under the contract of employment or prescribed by regulation, an employer may, in the case of suspected gross misconduct by the employee, suspend the employment of such employee with immediate effect pending an investigation into such 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 such 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 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 such 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 such 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, such 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), such 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, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he 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 he could not reasonably have been expected to avert, he left or proposed to leave or, while the danger persisted, refused to return to his place of work or any dangerous part of his place of work; or
- (e)** in circumstances of danger which the employee reasonably believed to be serious and imminent, he took, or proposed to take, appropriate steps to protect himself 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 shall be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the sole or principal reason for the dismissal of an employee is that specified in subsection (1)(e), he shall not 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 took, or proposed to take, that a reasonable employer might have dismissed him 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 such 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, provided that such disclosure is made—

- (a) to his 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) such employee reasonably believed that he would be victimised if he had raised the matter internally or with a prescribed regulator;
 - (ii) there was no prescribed regulator and he 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 such employee.

Part D

Remedies for Unfair Dismissal

Interim order for payment of 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 seven days from the effective date of termination, apply to the Regulator for an interim order for his salary to be continued, or re-commenced, to be paid until the matter is finally determined or for such shorter period as the Regulator thinks fit.

(2) The Regulator may, if he thinks fit, in accordance with subsection (1), order the employer to continue to pay the employee, forthwith and from, the effective date of

termination, 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 then the Regulator may make the order to run from the date the employee was paid up to by the employer.

Referral of claim for unfair dismissal to Regulator

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

(2) The Regulator shall determine the matter and where it finds in favour of the employee, the Regulator shall make a declaration to this effect and—

- (a)* may order the employer to reinstate or re-engage such employee as provided for in section 42 or 43, as the case may be, with or without an order for compensation under paragraph *(b)*;
- (b)* may make an award of compensation to be paid by the employer to the employee as provided for in section 44; and
- (c)* shall order the employer to pay a financial penalty not exceeding £200.

(3) In exercising its discretion under subsection (2)*(a)* to order the employer either to reinstate or to re-engage an employee, the Regulator shall take into account—

- (a)* whether the employee wishes to be reinstated or re-engaged;
- (b)* whether it is practicable for the employer to comply with an order for reinstatement or re-engagement; and
- (c)* where the employee caused, or contributed to some extent to, the dismissal, whether it would be just to order his reinstatement or re-engagement.

(4) The Regulator shall not consider any referral under this section unless such referral was made within three months from the effective date of termination, or such further period as the Regulator considers reasonable if he is satisfied that it was not reasonably practicable for the application to be made within such three month period.

Order for reinstatement

42. (1) An order for reinstatement is an order that the employer shall treat the employee in all respects as if he had not been dismissed.

(2) On making an order for reinstatement, the Regulator shall specify—

- (a)* any amount payable by the employer in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement; and
- (b)* any rights and privileges which must be restored to the employee.

(3) If the employee would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating any amount payable by the employer as referred to in subsection (2)*(a)*, the Regulator shall, so as to reduce the employer's liability, take into account any sums received by the employee in respect of the period between the date of termination of employment and the date of reinstatement by way of—

- (a)* any amount paid in lieu of notice or ex gratia payments made by the employer; and
- (b)* any remuneration paid in respect of employment with another employer;
- (c)* such other benefits as the Regulator thinks appropriate in the circumstances.

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Order for re-engagement

43. (1) An order for re-engagement is an order, on such terms as the Regulator may decide, that the employee be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the Regulator shall specify the terms on which re-engagement is to take place, including—

- (a)* the identity of the employer;
- (b)* the nature of the employment;
- (c)* the remuneration for the employment;
- (d)* any amount payable by the employer in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement; and
- (e)* any rights and privileges which must be restored to the employee.

(3) In calculating any amount payable by the employer as provided for in subsection (2)(d), the Regulator shall, so as to reduce the employer's liability, take into account any sums received by the employee in respect of the period between the date of termination of employment and the date of re-engagement by way of—

- (a)* any amount paid in lieu of notice or ex gratia payments made by the employer;
- (b)* remuneration paid in respect of employment with another employer; and
- (c)* such other benefits as the Regulator thinks appropriate in the circumstances.

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); 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) shall 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)*;

Provided that where the employee was continuously employed for more than 20 years, only the last 20 years of employment shall be taken into account for purposes of determining the amount of the basic award under this subsection.

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

(4) Where the Regulator finds any factors exist that would justify that the amount of the basic award be reduced to any extent, the Regulator shall reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.

(5) Where the Regulator finds on complaint by the employee that the employer has failed within 14 days of the date of the order to comply with an order made under section 41(2)(a) the Regulator may make an award under section 41(2)(b) to the employee not exceeding twice the basic award he is or would have been entitled to under subsection (2)(b) or £10,000 whichever is the less.

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 was made under section 18 or 19 may appeal against the order to the Magistrates' Court within 30 days following the date of service of the notice.

(2) On an appeal under subsection (1), the Magistrates' Court shall 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 such facts, he would not reasonably have come to the conclusion giving rise to the order;
- (b) where the order relates to two or more employees, that the facts are such that had the Regulator been aware of such facts, he would have had no reason to include some of the employees in the order against the appellant; or
- (c) where 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) Where an appeal is allowed by virtue of—

- (a) subsection (2)(a), the Magistrates' Court shall rescind the order; or
- (b) subsection (2)(b) or (c), the Magistrates' Court shall amend the order and the amended order shall have effect as if it had originally been served as so amended.

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 22, 26, 28, 40(2) or 41 may appeal to the Magistrates' Court by giving notice in writing within 30 days from the date of the Regulator's order.

(2) The Magistrates' 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 Magistrates' Court may impose a Financial Penalty upon an employer not exceeding £400 which shall be payable to the Clerk of the Peace within 30 days from the date of the Court's decision.

Part B

Enforcement of Orders

Enforcement of Regulator orders

47. (1) Subject to any right of appeal against an order by the Regulator, any amount payable under such order shall, 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), be recoverable by execution issued from the Magistrates' Court as if it were payable under an order of such court.

(2) Any person who fails to comply with an order of the Regulator under section 15(4)(a), 18(2)(a), 19(2)(b) or 22(2)(a) is guilty of an offence and liable on conviction to a fine not exceeding £3,000.

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

Financial penalties

48 (1) For the avoidance of doubt, the imposition of any financial penalty under Chapters III, IV, V or VI is not a criminal conviction, and such penalty is not a fine.

(2) Every financial penalty shall, unless otherwise provided for under this Ordinance, be paid to the Regulatory Authority within 30 days from the date on which it is imposed.

(3) If a financial penalty is not paid in accordance with subsection (2), the person who is liable to pay it is guilty of an offence and is liable upon conviction to a fine not exceeding 20 times the amount of the financial penalty.

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

(5) The Regulatory Authority shall as soon as possible after receiving any financial penalty under subsection (2) pay it 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 prejudice to the generality of 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)** 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. The Minimum Wage Ordinance, Cap. 120 is repealed.
