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STATUTORY INSTRUMENTS

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**1996 No. 1919**

**The Employment Rights (Northern Ireland) Order 1996**

PART XI

UNFAIR DISMISSAL

CHAPTER I

RIGHT NOT TO BE UNFAIRLY DISMISSED

*Fairness*

**General**

**130.**—(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this paragraph if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under a statutory provision.

(3) In paragraph (2)(a)—

- (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- (b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

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- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case.

(5) Where the employee is taken to be dismissed for the purposes of this Part by virtue of Article 128, paragraph (4)(a) applies as if for the words “acted reasonably” onwards there were substituted the words “would have been acting reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee if she had not been absent from work, and”.

(6) Paragraphs (4) and (5) are subject to Articles 131 to 139 and 144.

### **Pregnancy and childbirth**

**131.**—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

- (a) the reason (or, if more than one, the principal reason) for the dismissal is that she is pregnant or any other reason connected with her pregnancy,
- (b) her maternity leave period is ended by the dismissal and the reason (or, if more than one, the principal reason) for the dismissal is that she has given birth to a child or any other reason connected with her having given birth to a child,
- (c) her contract of employment is terminated after the end of her maternity leave period and the reason (or, if more than one, the principal reason) for the dismissal is that she took, or availed herself of the benefits of, maternity leave,
- (d) the reason (or, if more than one, the principal reason) for the dismissal is a relevant requirement, or a relevant recommendation, as defined by Article 98(2), or
- (e) her maternity leave period is ended by the dismissal, the reason (or, if more than one, the principal reason) for the dismissal is that she is redundant and Article 109 has not been complied with.

(2) For the purposes of paragraph (1)(c)—

- (a) a woman takes maternity leave if she is absent from work during her maternity leave period, and
- (b) a woman avails herself of the benefits of maternity leave if, during her maternity leave period, she avails herself of the benefit of any of the terms and conditions of her employment preserved by Article 103 during that period.

(3) An employee who is dismissed shall also be regarded for the purposes of this Part as unfairly dismissed if—

- (a) before the end of her maternity leave period she gave to her employer a certificate from a registered medical practitioner stating that by reason of disease or bodily or mental disablement she would be incapable of work after the end of that period,
- (b) her contract of employment was terminated within the period of four weeks beginning immediately after the end of her maternity leave period in circumstances in which she continued to be incapable of work and the certificate remained current, and
- (c) the reason (or, if more than one, the principal reason) for the dismissal is that she has given birth to a child or any other reason connected with her having given birth to a child.

(4) Where—

- (a) an employee has the right conferred by Article 111,
- (b) it is not practicable by reason of redundancy for the employer to permit her to return in accordance with that right, and
- (c) no offer is made of such alternative employment as is referred to in Article 113,

the dismissal of the employee which is treated as taking place by virtue of Article 128 is to be regarded for the purposes of this Part as unfair.

### **Health and safety cases**

**132.**—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the 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) any such activities,
- (b) being a representative of workers on matters of health and safety at work or member of a safety committee—

- (i) in accordance with arrangements established under or by virtue of any statutory provision, or

- (ii) by reason of 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—

- (i) there was no such representative or safety committee, or

- (ii) 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 paragraph (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to 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 reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in paragraph (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.

### **Trustees of occupational pension schemes**

**133.**—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that, being a trustee of a relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.

(2) In this Article "relevant occupational pension scheme" means an occupational pension scheme (as defined in section 1 of the Pension Schemes (Northern Ireland) Act 1993) established under a trust.

**Employee representatives**

**134.** An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee, being—

- (a) an employee representative for the purposes of Part XIII of this Order or Regulations 10 and 11 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, or
- (b) a candidate in an election in which any person elected will, on being elected, be such an employee representative,

performed (or proposed to perform) any functions or activities as such an employee representative or candidate.

**Assertion of statutory right**

**135.—(1)** An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

- (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
  - (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
- (2) It is immaterial for the purposes of paragraph (1)—
- (a) whether or not the employee has the right, or
  - (b) whether or not the right has been infringed;

but, for that paragraph to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for paragraph (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

- (4) The following are relevant statutory rights for the purposes of this Article—
- (a) any right conferred by this Order for which the remedy for its infringement is by way of a complaint or reference to an industrial tribunal,
  - (b) the right conferred by Article 118 of this Order, and
  - (c) the rights conferred by Articles 35 and 60 of the Trade Union and Labour Relations Order (deductions from pay).

**Trade union membership or activities**

**136.—(1)** An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for his dismissal is that the employee—

- (a) was, or proposed to become, a member of an independent trade union, or
- (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, or
- (c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.

(2) In paragraph (1)(b) “an appropriate time” means—

- (a) a time outside the employee’s working hours, or

- (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union;

and for this purpose “working hours”, in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

- (3) Where the reason, or one of the reasons, for the dismissal was —
  - (a) the employee’s refusal, or proposed refusal, to comply with a requirement (whether or not imposed by his contract of employment or in writing) that, in the event of his not being a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, he must make one or more payments, or
  - (b) his objection, or proposed objection, (however expressed) to the operation of a provision (whether or not forming part of his contract of employment or in writing) under which, in the event mentioned in sub-paragraph (a), his employer is entitled to deduct one or more sums from the remuneration payable to him in respect of his employment,

the reason shall be treated as falling within paragraph (1)(c).

(4) References in this Article to being or becoming a member of a trade union include references to being or becoming a member of a particular branch or section of that union or of one of a number of particular branches or sections of that trade union; and references to taking part in the activities of a trade union shall be similarly construed.

## **Redundancy**

**137.**—(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

- (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
- (b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
- (c) it is shown that any of paragraphs (2) to (7) applies.

(2) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in any of sub-paragraphs (a) to (d) of paragraph (1) of Article 131 (read with paragraph (2) of that Article) or paragraph (3) of that Article (and any requirements of the sub-paragraph, or paragraph, not relating to the reason are satisfied).

(3) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in paragraph (1) of Article 132 (read with paragraphs (2) and (3) of that Article).

(4) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in Article 133(1).

(5) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in Article 134.

(6) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in paragraph (1) of Article 135 (read with paragraphs (2) and (3) of that Article).

(7) This paragraph applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one of those specified in Article 136(1) (read with paragraph (3) of that Article).

(8) In this Part “redundancy case” means a case where sub-paragraphs (a) and (b) of paragraph (1) of this Article are satisfied.

### **Replacements**

**138.**—(1) Where this Article applies to an employee he shall be regarded for the purposes of Article 130(1)(b) as having been dismissed for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) This Article applies to an employee where—

- (a) on engaging him the employer informs him in writing that his employment will be terminated on the resumption of work by another employee who is, or will be, absent wholly or partly because of pregnancy or childbirth, and
- (b) the employer dismisses him in order to make it possible to give work to the other employee.

(3) This Article also applies to an employee where—

- (a) on engaging him the employer informs him in writing that his employment will be terminated on the end of a suspension of another employee from work on medical grounds or maternity grounds (within the meaning of Part VIII), and
- (b) the employer dismisses him in order to make it possible to allow the resumption of work by the other employee.

(4) Paragraph (1) does not affect the operation of Article 130(4) in a case to which this Article applies.

### **Pressure on employer to dismiss unfairly**

**139.**—(1) This Article applies where there falls to be determined for the purposes of this Part a question—

- (a) as to the reason, or principal reason, for which an employee was dismissed,
- (b) whether the reason or principal reason for which an employee was dismissed was a reason fulfilling the requirement of Article 130(1)(b), or
- (c) whether an employer acted reasonably in treating the reason or principal reason for which an employee was dismissed as a sufficient reason for dismissing him.

(2) In determining the question no account shall be taken of any pressure which by calling, organising, procuring or financing a strike or other industrial action, or threatening to do so, was exercised on the employer to dismiss the employee; and the question shall be determined as if no such pressure had been exercised.