

SCHEDULES

SCHEDULE 3

EMPLOYMENT RIGHTS IN HEALTH AND SAFETY CASES

PART IV

ARTICLES 39 TO 41 OF THE NO. 1 ORDER, AS SUBSTITUTED

Interim relief

Interim relief pending determination of complaint of unfair dismissal

39.—(1) An employee who presents a complaint to an industrial tribunal under Article 29 alleging —

- (a) that the dismissal is unfair by virtue of Article 22A; or
- (b) that the reason (or, if more than one, the principal reason) for the dismissal was one of those specified in Article 22B(1)(a) and (b),

may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) In a case where the employee relies on Article 22A(1)(a) or (b) the tribunal shall not entertain an application for interim relief unless before the end of that period there is also so presented a certificate in writing signed by an authorised official of the independent trade union of which the employee was or proposed to become a member stating—

- (a) that on the date of the dismissal the employee was or proposed to become a member of the union; and
- (b) that there appear to be reasonable grounds for supposing that the reason for his dismissal (or, if more than one, the principal reason) was one alleged in the complaint.

(4) An “authorised official” means an official of the trade union authorised by it to act for the purposes of this Article.

(5) A document purporting to be an authorisation of an official by a trade union to act for the purposes of this Article and to be signed on behalf of the union shall be taken to be such an authorisation unless the contrary is proved; and a document purporting to be a certificate signed by such an official shall be taken to be signed by him unless the contrary is proved.

(6) For the purposes of paragraph (3) the date of dismissal shall be taken to be—

- (a) where the employee’s contract of employment was terminated by notice (whether given by his employer or by him), the date on which the notice was given; and
- (b) in any other case, the effective date of termination.

(7) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application and, where appropriate, the requisite certificate.

(8) The tribunal shall give to the employer (not later than seven days before the date of the hearing) a copy of the application and of any certificate together with notice of the date, time and place of the hearing.

(9) If a request under Article 38A is made three days or more before the date of the hearing, the tribunal shall also give to the person to whom the request relates, as soon as reasonably practicable, a copy of the application and of any certificate, together with notice of the date, time and place of the hearing.

(10) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

Procedure on hearing of application and making of order

39A.—(1) If on hearing an employee’s application for interim relief it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

- (a) that, by virtue of Article 22A, the employee has been unfairly dismissed; or
- (b) that the reason (or, if more than one, the principal reason) for the employee’s dismissal was one of those specified in Article 22B(1)(a) and (b),

the following provisions shall apply.

(2) The tribunal shall announce its findings and explain to both parties (if present) what powers the tribunal may exercise on the application and in what circumstances it will exercise them, and shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

- (a) to reinstate the employee, that is to say, to treat him in all respects as if he had not been dismissed; or
- (b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(3) For this purpose “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(4) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(5) If the employer states that he is willing to re-engage the employee in another job and specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions; and—

- (a) if the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect; and
- (b) if he is not, then, if the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, but otherwise the tribunal shall make no order.

(6) If on the hearing of an application for interim relief the employer fails to attend before the tribunal, or states that he is unwilling either to reinstate the employee or re-engage him as mentioned in paragraph (2), the tribunal shall make an order for the continuation of the employee’s contract of employment.

Orders for continuation of contract of employment

40.—(1) An order under Article 39A for the continuation of a contract of employment is an order that the contract of employment continue in force—

- (a) for the purposes of pay or of any other benefit derived from the employment, seniority, pension rights and other similar matters; and
- (b) for the purposes of determining for any purpose the period for which the employee has been continuously employed,

from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.

(2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.

(3) Subject as follows, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—

- (a) in the case of payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period; and
- (b) in the case of a payment for any past period, within such time as may be specified in the order.

(4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.

(5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, shall go towards discharging the employer's liability in respect of that period under paragraph (2); and, conversely, any payment under that paragraph in respect of a period shall go towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.

(6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.

(7) For the purposes of this Article, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.

Application for variation or revocation of order

40A.—(1) At any time between the making of an order under Article 39A and the determination or settlement of the complaint, the employer or the employee may apply to an industrial tribunal for the revocation or variation of the order on the ground of a relevant change of circumstances since the making of the order.

(2) Articles 39 and 39A apply in relation to such an application as in relation to an original application for interim relief, except that—

- (a) no certificate need be presented to the tribunal under Article 39(3); and
- (b) in the case of an application by the employer, Article 39(8) has effect with the substitution of a reference to the employee for the reference to the employer.

Consequence of failure to comply with order

41.—(1) If on the application of an employee an industrial tribunal is satisfied that the employer has not complied with the terms of an order for the reinstatement or re-engagement of the employee under Article 39A(4) or (5), the tribunal shall—

- (a) make an order for the continuation of the employee’s contract of employment; and
- (b) order the employer to pay the employee such compensation as the tribunal considers just and equitable in all the circumstances having regard—
 - (i) to the infringement of the employee’s right to be reinstated or re-engaged in pursuance of the order; and
 - (ii) to any loss suffered by the employee in consequence of the non-compliance.

(2) Article 40 applies to an order under paragraph (1)(a) as in relation to an order under Article 39A.

(3) If on the application of an employee an industrial tribunal is satisfied that the employer has not complied with the terms of an order for the continuation of a contract of employment, the following provisions apply.

(4) If the non-compliance consists of a failure to pay an amount by way of pay specified in the order, the tribunal shall determine the amount owed by the employer on the date of the determination.

(5) If on that date the tribunal also determines the employee’s complaint that he has been unfairly dismissed, it shall specify that amount separately from any other sum awarded to the employee.

(6) In any other case, the tribunal shall order the employer to pay the employee such compensation as the tribunal considers just and equitable in all the circumstances having regard to any loss suffered by the employee in consequence of the non-compliance.