

SCHEDULE 6

Regulation 47

Duty to consider working beyond retirement

Interpretation

1.—(1) In this Schedule—

“dismissal” means a dismissal within the meaning of section 95 of the 1996 Act⁽¹⁾;

“employee” means a person to whom regulation 30 (exception for retirement) applies and references to “employer” shall be construed accordingly;

“intended date of retirement” has the meaning given by sub-paragraph (2);

“operative date of termination” means (subject to paragraph 10(3))—

(a) where the employer terminates the employee’s contract of employment by notice, the date on which the notice expires, or

(b) where the employer terminates the contract of employment without notice, the date on which the termination takes effect;

“request” means a request made under paragraph 5; and

“worker” has the same meaning as in section 230(3) of the 1996 Act.

(2) In this Schedule “intended date of retirement” means—

(a) where the employer notifies a date in accordance with paragraph 2, that date;

(b) where the employer notifies a date in accordance with paragraph 4 and either no request is made or a request is made after the notification, that date;

(c) where,

(i) the employer has not notified a date in accordance with paragraph 2,

(ii) a request is made before the employer has notified a date in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given),

(iii) the request is made by an employee who has reasonable grounds for believing that the employer intends to retire him on a certain date, and,

(iv) the request identifies that date,

the date so identified;

(d) in a case to which paragraph 3 has applied, any earlier or later date that has superseded the date mentioned in paragraph (a), (b) or (c) as the intended date of retirement by virtue of paragraph 3(3);

(e) in a case to which paragraph 10 has applied, the later date that has superseded the date mentioned in paragraph (a), (b) or (c) as the intended date of retirement by virtue of paragraph 10(3)(b).

Duty of employer to inform employee

2.—(1) An employer who intends to retire an employee has a duty to notify the employee in writing of—

(a) the employee’s right to make a request; and

(1) Employment Rights Act 1996 (c. 18); section 95 has been amended by section 57 of, and by Schedule 1, paragraph 29, and Schedule 2 to, the Employment Relations Act 2004 (c. 24), and by regulation 11 of, and paragraph 3(1) and (7) of Part 1 of Schedule 2 to, S.I.2002/2034.

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(b) the date on which he intends the employee to retire,
not more than one year and not less than six months before that date.

(2) The duty to notify applies regardless of—

- (a) whether there is any term in the employee’s contract of employment indicating when his retirement is expected to take place,
- (b) any other notification of, or information about, the employee’s date of retirement given to him by the employer at any time, and
- (c) any other information about the employee’s right to make a request given to him by the employer at any time.

3.—(1) This paragraph applies if the employer has notified the employee in accordance with paragraph 2 or 4 or the employee has made a request before being notified in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given), and—

- (a) the employer and employee agree, in accordance with paragraph 7(3)(b) or 8(5)(b), that the dismissal is to take effect on a date later than the relevant date;
- (b) the employer gives notice to the employee, in accordance with paragraph 7(7)(a)(ii) or, where the employee appeals, paragraph 8(9)(a)(ii), that the dismissal is to take effect on a date later than the relevant date; or
- (c) the employer and employee agree that the dismissal is to take effect on a date earlier than the relevant date.

(2) This Schedule does not require the employer to give the employee a further notification in respect of dismissal taking effect on a date—

- (a) agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) that is later than the relevant date and falls six months or less after the relevant date; or
- (b) agreed as mentioned in sub-paragraph (1)(c) that is earlier than the relevant date.

(3) If—

- (a) a date later than the relevant date is agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) and falls six months or less after the relevant date, or
- (b) a date earlier than the relevant date is agreed as mentioned in sub-paragraph (1)(c),

the earlier or later date shall supersede the relevant date as the intended date of retirement.

(4) In this paragraph, “the relevant date” means the date that is defined as the intended date of retirement in paragraph (a), (b) or (c) of paragraph 1(2).

Continuing duty to inform employee

4. Where the employer has failed to comply with paragraph 2, he has a continuing duty to notify the employee in writing as described in paragraph 2(1) until the fourteenth day before the operative date of termination.

Statutory right to request not to retire

5.—(1) An employee may make a request to his employer not to retire on the intended date of retirement.

(2) In his request the employee must propose that his employment should continue, following the intended date of retirement—

- (a) indefinitely,
- (b) for a stated period, or

(c) until a stated date;

and, if the request is made at a time when it is no longer possible for the employer to notify in accordance with paragraph 2 and the employer has not yet notified in accordance with paragraph 4, must identify the date on which he believes that the employer intends to retire him.

(3) A request must be in writing and state that it is made under this paragraph.

(4) An employee may only make one request under this paragraph in relation to any one intended date of retirement and may not make a request in relation to a date that supersedes a different date as the intended date of retirement by virtue of paragraph 3(3) or 10(3)(b).

(5) A request is only a request made under this paragraph if it is made—

(a) in a case where the employer has complied with paragraph 2, more than three months but not more than six months before the intended date of retirement, or

(b) in a case where the employer has not complied with paragraph 2, before, but not more than six months before, the intended date of retirement.

An employer's duty to consider a request

6. An employer to whom a request is made is under a duty to consider the request in accordance with paragraphs 7 to 9.

Meeting to consider request

7.—(1) An employer having a duty under paragraph 6 to consider a request shall hold a meeting to discuss the request with the employee within a reasonable period after receiving it.

(2) The employer and employee must take all reasonable steps to attend the meeting.

(3) The duty to hold a meeting does not apply if, before the end of the period that is reasonable—

(a) the employer and employee agree that the employee's employment will continue indefinitely and the employer gives notice to the employee to that effect; or

(b) the employer and employee agree that the employee's employment will continue for an agreed period and the employer gives notice to the employee of the length of that period or of the date on which it will end.

(4) The duty to hold a meeting does not apply if—

(a) it is not practicable to hold a meeting within the period that is reasonable, and

(b) the employer complies with sub-paragraph (5).

(5) Where sub-paragraph (4)(a) applies, the employer may consider the request without holding a meeting provided he considers any representations made by the employee.

(6) The employer shall give the employee notice of his decision on the request as soon as is reasonably practicable after the date of the meeting or, if sub-paragraphs (4) and (5) apply, his consideration of the request.

(7) A notice given under sub-paragraph (6) shall—

(a) where the decision is to accept the request, state that it is accepted and—

(i) where the decision is that the employee's employment will continue indefinitely, state that fact, or

(ii) where the decision is that the employee's employment will continue for a further period, state that fact and specify the length of the period or the date on which it will end,

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(b) where the decision is to refuse the request, confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect, and, in the case of a notice falling within paragraph (b), and of a notice referred to in paragraph (a) that specifies a period shorter than the period proposed by the employee in the request, shall inform the employee of his right to appeal.

(8) All notices given under this paragraph shall be in writing and be dated.

Appeals

8.—(1) An employee is entitled to appeal against—

- (a) a decision of his employer to refuse the request, or
- (b) a decision of his employer to accept the request where the notice given under paragraph 7(6) states as mentioned in paragraph 7(7)(a)(ii) and specifies a period shorter than the period proposed by the employee in the request,

by giving notice in accordance with sub-paragraph (2) as soon as is reasonably practicable after the date of the notice given under paragraph 7(6).

(2) A notice of appeal under sub-paragraph (1) shall set out the grounds of appeal.

(3) The employer shall hold a meeting with the employee to discuss an appeal within a reasonable period after the date of the notice of appeal.

(4) The employer and employee must take all reasonable steps to attend the meeting.

(5) The duty to hold a meeting does not apply if, before the end of the period that is reasonable—

- (a) the employer and employee agree that the employee's employment will continue indefinitely and the employer gives notice to the employee to that effect; or
- (b) the employer and employee agree that the employee's employment will continue for an agreed period and the employer gives notice to the employee of the length of that period or of the date on which it will end.

(6) The duty to hold a meeting does not apply if—

- (a) it is not practicable to hold a meeting within the period that is reasonable, and
- (b) the employer complies with sub-paragraph (7).

(7) Where sub-paragraph (6)(a) applies, the employer may consider the appeal without holding a meeting provided he considers any representations made by the employee.

(8) The employer shall give the employee notice of his decision on the appeal as soon as is reasonably practicable after the date of the meeting or, if sub-paragraphs (6) and (7) apply, his consideration of the appeal.

(9) A notice under sub-paragraph (8) shall—

- (a) where the decision is to accept the appeal, state that it is accepted and—
 - (i) where the decision is that the employee's employment will continue indefinitely, state that fact, or
 - (ii) where the decision is that the employee's employment will continue for a further period, state that fact and specify the length of the period or the date on which it will end,
- (b) where the decision is to refuse the appeal, confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect.

(10) All notices given under this paragraph shall be in writing and be dated.

Right to be accompanied

9.—(1) This paragraph applies where—

- (a) a meeting is held under paragraph 7 or 8, and
- (b) the employee reasonably requests to be accompanied at the meeting.

(2) Where this paragraph applies the employer must permit the employee to be accompanied at the meeting by one companion who—

- (a) is chosen by the employee;
- (b) is a worker employed by the same employer as the employee;
- (c) is to be permitted to address the meeting (but not to answer questions on behalf of the employee); and
- (d) is to be permitted to confer with the employee during the meeting.

(3) If—

- (a) an employee has a right under this paragraph to be accompanied at a meeting,
- (b) his chosen companion will not be available at the time proposed for the meeting by the employer, and
- (c) the employee proposes an alternative time which satisfies sub-paragraph (4),

the employer must postpone the meeting to the time proposed by the employee.

(4) An alternative time must—

- (a) be convenient for employer, employee and companion, and
- (b) fall before the end of the period of seven days beginning with the first day after the day proposed by the employer.

(5) An employer shall permit a worker to take time off during working hours for the purpose of accompanying an employee in accordance with a request under sub-paragraph (1)(b).

(6) Sections 168(3) and (4), 169 and 171 to 173 of the Trade Union and Labour Relations (Consolidation) Act 1992⁽²⁾ (time off for carrying out trade union duties) shall apply in relation to sub-paragraph (5) above as they apply in relation to section 168(1) of that Act.

Dismissal before request considered

10.—(1) This paragraph applies where—

- (a) by virtue of paragraph 6 an employer is under a duty to consider a request;
- (b) the employer dismisses the employee;
- (c) that dismissal is the contemplated dismissal to which the request relates; and
- (d) the operative date of termination would, but for sub-paragraph (3), fall on or before the day on which the employer gives notice in accordance with paragraph 7(6).

(2) Subject to sub-paragraph (4), the contract of employment shall continue in force for all purposes, including the purpose of determining for any purpose the period for which the employee has been continuously employed, until the day following that on which the notice under paragraph 7(6) is given.

(3) The day following the day on which that notice is given shall supersede—

- (a) the date mentioned in sub-paragraph (1)(d) as the operative date of termination; and

(2) 1992 c. 52; sections 171 and 173 have been amended by section 1(2)(a) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8). There are other amendments to these provisions which are not relevant for the purposes of these Regulations.

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(b) the date defined as the intended date of retirement in paragraph (a), (b) or (c) of paragraph 1(2) as the intended date of retirement.

(4) Any continuation of the contract of employment under sub-paragraph (2) shall be disregarded when determining the operative date of termination for the purposes of sections 98ZA to 98ZH of the 1996 Act.

Complaint to employment tribunal: failure to comply with paragraph 2

11.—(1) An employee may present a complaint to an employment tribunal that his employer has failed to comply with the duty to notify him in paragraph 2.

(2) A tribunal shall not consider a complaint under this paragraph unless the complaint is presented—

(a) before the end of the period of three months beginning with—

(i) the last day permitted to the employer by paragraph 2 for complying with the duty to notify, or

(ii) if the employee did not then know the date that would be the intended date of retirement, the first day on which he knew or should have known that date; or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where a tribunal finds that a complaint under this paragraph is well-founded it shall order the employer to pay compensation to the employee of such amount, not exceeding 8 weeks' pay, as the tribunal considers just and equitable in all the circumstances.

(4) Chapter 2 of Part 14 of the 1996 Act (calculation of a week's pay) shall apply for the purposes of sub-paragraph (3); and in applying that Chapter the calculation date shall be taken to be the date on which the complaint was presented or, if earlier, the operative date of termination.

(5) The limit in section 227(1) of the 1996 Act⁽³⁾ (maximum amount of a week's pay) shall apply for the purposes of sub-paragraph (3).

Complaint to employment tribunal: denial of right to be accompanied

12.—(1) An employee may present a complaint to an employment tribunal that his employer has failed, or threatened to fail, to comply with paragraph 9(2) or (3).

(2) A tribunal shall not consider a complaint under this paragraph in relation to a failure or threat unless the complaint is presented—

(a) before the end of the period of three months beginning with the date of the failure or threat; or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(3) Where a tribunal finds that a complaint under this paragraph is well-founded it shall order the employer to pay compensation to the worker of an amount not exceeding two weeks' pay.

(4) Chapter 2 of Part 14 of the 1996 Act (calculation of a week's pay) shall apply for the purposes of sub-paragraph (3); and in applying that Chapter the calculation date shall be taken to be the date on which the relevant meeting took place (or was to have taken place).

(3) 1996 c. 18; the amount laid down in section 227 may be increased or decreased by Order made by the Secretary of State under section 34 of the Employment Relations Act 1999. The amount laid down in section 227 is currently £290: see S.I. 2005/3352.

(5) The limit in section 227(1) of the 1996 Act (maximum amount of a week's pay) shall apply for the purposes of sub-paragraph (3).

Detriment and dismissal

13.—(1) An employee has the right not to be subjected to any detriment by any act by his employer done on the ground that he exercised or sought to exercise his right to be accompanied in accordance with paragraph 9.

(2) A worker 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 he accompanied or sought to accompany an employee pursuant to a request under paragraph 9.

(3) Section 48 of the 1996 Act shall apply in relation to contraventions of sub-paragraph (1) or (2) above as it applies in relation to contraventions of certain sections of that Act.

(4) Sub-paragraph (2) does not apply where the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part 10 of the 1996 Act).

(5) An employee who is dismissed shall be regarded for the purposes of Part 10 of the 1996 Act as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—

- (a) exercised or sought to exercise his right to be accompanied in accordance with paragraph 9, or
- (b) accompanied or sought to accompany an employee pursuant to a request under that paragraph.

(6) Sections 128 to 132 of the 1996 Act (interim relief) shall apply in relation to dismissal for the reason specified in sub-paragraph (5)(a) or (b) above as they apply in relation to dismissal for a reason specified in section 128(1)(b) of that Act.