



2008 CHAPTER 13

PART 1

PENSION SCHEME MEMBERSHIP FOR JOBHOLDERS

CHAPTER 3

SAFEGUARDS: EMPLOYMENT AND PRE-EMPLOYMENT

Prohibited recruitment conduct

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50.—(1) An employer contravenes this section if any statement made or question asked by or on behalf of the employer for the purposes of recruitment indicates (expressly or impliedly) that an application for employment with the employer may be determined by reference to whether or not an applicant might opt out of automatic enrolment.

(2) The reference in subsection (1) to a statement made or a question asked for the purposes of recruitment is a reference to one made or asked in the course of any of the following—

- (a) inviting applications for employment;
- (b) requesting information from an applicant, referee or other person in connection with an application for employment;
- (c) providing information about employment;
- (d) proposing terms or conditions of employment.

(3) The reference in subsection (1) to an applicant opting out of automatic enrolment is a reference to the applicant, if becoming at any time in the course of the employment a jobholder to whom section 3 or 5 applies, giving notice

in accordance with section 8 in relation to arrangements made by the employer under the relevant section.

(4) In this section and sections 51 and 52, “employer” means the prospective employer in relation to any employment.

Compliance notices

51.—(1) The Regulator may issue a compliance notice to an employer if it is of the opinion that the employer has contravened section 50.

(2) A compliance notice is a notice directing the employer to take, or refrain from taking, the steps specified in the notice in order to—

- (a) remedy the contravention, or
- (b) prevent the contravention being repeated.

(3) A compliance notice may, in particular—

- (a) state the period within which any step must be taken or must cease to be taken;
- (b) require the employer to provide within a specified period specified information relating to the contravention;
- (c) require the employer to inform the Regulator, within a specified period, how the employer has complied or is complying with the notice;
- (d) state that, if the employer fails to comply with the requirements of the notice, the Regulator may issue a penalty notice under section 52.

(4) A compliance notice must specify the contravention to which the notice relates.

Penalty notices

52.—(1) The Regulator may issue a penalty notice to an employer if it is of the opinion that the employer—

- (a) has contravened section 50, or
- (b) has failed to comply with a compliance notice under section 51.

(2) A penalty notice is a notice requiring the person to whom it is issued to pay a penalty within the period specified in the notice.

(3) The penalty—

- (a) is to be determined in accordance with regulations, and
- (b) must not exceed £50,000.

(4) A penalty notice must—

- (a) state the amount of the penalty;

- (b) state the date, which must be at least four weeks after the date on which the notice is issued, by which the penalty must be paid;
- (c) specify the contravention or failure to which the notice relates;
- (d) notify the employer of the review process under section 43 and the right to make a reference under section 44 (as applied by section 53).

(5) Section 42 (penalty notices: recovery) applies to a penalty payable under this section, and to a notice under this section, as it applies to a penalty payable under section 40, and to a notice under that section.

Review of notices and references to the Pensions Regulator Tribunal

53.—(1) Section 43 (review of notices) also applies to a compliance notice issued under section 51 and to a penalty notice issued under section 52.

(2) Section 44 (references to the Pensions Regulator Tribunal) applies in relation to a penalty notice issued under section 52 as it applies in relation to a notice issued under section 40 or 41.

Inducements

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54.—(1) An employer contravenes this section if the employer takes any action for the sole or main purpose of—

- (a) inducing a worker to give up membership of a relevant scheme without becoming an active member of another relevant scheme within the period prescribed under section 2(3), or
- (b) inducing a jobholder to give a notice under section 8 without becoming an active member of a qualifying scheme within the period prescribed under section 2(3).

(2) Section 35 applies in relation to a contravention of this section as it applies in relation to a contravention of section 2(1), and sections 38 to 44 apply accordingly.

(3) But the Regulator may not issue a compliance notice in respect of a contravention of this section unless the contravention occurred within the prescribed period before—

- (a) the time when a complaint was made to the Regulator about the contravention, or
- (b) the time when the Regulator informed the employer of an investigation of the contravention, if no complaint was made before that time.

(4) A compliance notice in respect of a contravention of this section may direct the employer to take or refrain from taking specified steps in order to prevent the contravention being repeated.

(5) For the purposes of this section a worker gives up membership of a relevant scheme if the worker—

- (a) takes action or makes an omission by which the worker, without ceasing to be employed by the employer, ceases to be an active member of the scheme, or
- (b) requests or authorises the employer to take such action or to make such an omission.

(6) In this section, “relevant scheme” means—

- (a) in relation to a jobholder, a qualifying scheme;
- (b) in relation to a worker to whom section 9 applies, a scheme which satisfies the requirements of that section.

Protection of employment rights

The right not to suffer detriment

55.—(1) A worker has the right not to be subjected to any detriment by an act, or a deliberate failure to act, by the worker’s employer, done on the ground that—

- (a) any action was taken, or was proposed to be taken, with a view to enforcing in favour of the worker a requirement to which this section applies,
 - (b) the employer was prosecuted for an offence under section 45 as a result of action taken for the purpose of enforcing in favour of the worker a requirement to which this section applies, or
 - (c) any provision of Chapter 1 applies to the worker, or will or might apply.
- (2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1)—
- (a) whether or not the requirement applies in favour of the worker, or
 - (b) whether or not the requirement has been contravened,

but, for that subsection to apply, the claim that the requirement applies and, if applicable, the claim that it has been contravened must be made in good faith.

(3) This section applies to any requirement imposed on the employer by or under any provision of Chapter 1.

(4) This section does not apply where the detriment in question amounts to dismissal within the meaning of Part 11 of the [Employment Rights \(Northern Ireland\) Order 1996 \(NI 16\)](#) (in this Act referred to as “the Employment Rights Order”) (unfair dismissal).

(5) In this section references to enforcing a requirement include references to securing its benefit in any way.

Enforcement of the right

56.—(1) A worker may present a complaint to an industrial tribunal that the worker has been subjected to a detriment in contravention of section 55.

(2) Subject to the following provisions of this section, the provisions of Articles 71(2) to (4) and 72 of the Employment Rights Order (complaints to industrial tribunals and remedies), apply in relation to a complaint under this section as they apply in relation to a complaint under Article 71 of that Order, but taking references in those provisions to the employer as references to the employer within the meaning of section 55(1).

(3) Where—

- (a) the detriment to which the worker is subjected is the termination of the worker's contract, but
- (b) that contract is not a contract of employment,

any compensation awarded under Article 72 of the Employment Rights Order by virtue of subsection (2) must not exceed the limit specified in subsection (4).

(4) The limit is the total of—

- (a) the sum which would be the basic award for unfair dismissal, calculated in accordance with Article 153 of the Employment Rights Order, if the worker had been an employee within the meaning of that Order and the contract terminated had been a contract of employment, and
- (b) the sum for the time being specified in Article 158(1) of that Order which is the limit for a compensatory award to a person calculated in accordance with Article 157 of that Order.

(5) Where the worker has been working under arrangements which do not fall to be regarded as a worker's contract for the purposes of the Employment Rights Order, the worker is to be treated for the purposes of subsections (3) and (4) as if any arrangements under which the worker has been working constituted a worker's contract falling within Article 3(3)(b) of that Order.

(6) In Article 20(1) of the [Industrial Tribunals \(Northern Ireland\) Order 1996 \(NI 18\)](#) (proceedings where conciliation is available), after sub-paragraph (q) add “, or

- (r) under section 56 of the Pensions (No. 2) Act (Northern Ireland) 2008.”.

Right of employee not to be unfairly dismissed

57.—(1) The Employment Rights Order is amended as follows.

(2) After Article 135C (flexible working) insert—

“Pension enrolment

135D.—(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) any action was taken, or was proposed to be taken, with a view to enforcing in favour of the employee a requirement to which this Article applies;
- (b) the employer was prosecuted for an offence under section 45 of the Pensions (No. 2) Act (Northern Ireland) 2008 as a result of action taken for the purposes of enforcing in favour of the employee a requirement to which this Article applies; or
- (c) any provision of Chapter 1 of that Part of that Act applies to the employee, or will or might apply.

(2) It is immaterial for the purposes of sub-paragraph (a) or (b) of paragraph (1)—

- (a) whether or not the requirement applies in favour of the employee, or
- (b) whether or not the requirement has been contravened,

but, for that paragraph to apply, the claim that the requirement applies and, if applicable, the claim that it has been contravened must be made in good faith.

(3) This Article applies to any requirement imposed on the employer by or under any provision of Chapter 1 of Part 1 of the Pensions (No. 2) Act (Northern Ireland) 2008.

(4) In this Article references to enforcing a requirement include references to securing its benefit in any way.”.

(3) In Article 137 (redundancy as unfair dismissal), in paragraph (1)(c) (which refers to any of paragraphs (2A) to (7I) of that Article applying) for “(7I)” substitute “(7J)”.

(4) After paragraph (7I) of that Article insert—

“(7J) 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 135D (read with paragraph (2) of that Article).”.

(5) In Article 140 (exclusion of right: qualifying period of employment) in paragraph (3) (cases where no qualifying period is required) after sub-paragraph (fh) insert—

“(fi) paragraph (1) of Article 135D (read with paragraph (2) of that Article) applies.”.

(6) In Article 143(2) (cases where employee may complain of unfair dismissal despite participation in unofficial industrial action), after sub-paragraph (d) insert—

“(dd) Article 135D applies.”.

(7) In Article 144(2) (cases where industrial tribunal to determine whether dismissal of an employee is unfair despite limitation in paragraph (1) of that Article), after sub-paragraph (d) insert—

“(dd) Article 135D applies;”.

Restrictions on agreements to limit operation of this Part

58.—(1) Any provision in any agreement (whether a worker’s contract or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of this Part, or
- (b) to preclude a person from bringing proceedings under section 56 before an industrial tribunal.

(2) The fact that an agreement is to any extent void under subsection (1) does not entitle the employer to recover any property transferred, or the value of any benefit conferred, as an inducement to enter into, or otherwise in connection with, the agreement.

(3) Subsection (1) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under Article 20 of the [Industrial Tribunals \(Northern Ireland\) Order 1996 \(NI 18\)](#) (conciliation).

(4) Subsection (1) does not apply to any agreement to refrain from instituting or continuing before an industrial tribunal any proceedings within Article 20(1)(r) of the [Industrial Tribunals \(Northern Ireland\) Order 1996 \(NI 18\)](#) (proceedings under this Act where conciliation is available) if the conditions regulating compromise agreements under this Act are satisfied in relation to the agreement.

(5) For the purposes of subsection (4) the conditions regulating compromise agreements under this Act are that—

- (a) the agreement must be in writing,
- (b) the agreement must relate to the particular proceedings,
- (c) the worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an industrial tribunal,
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or a professional body, covering the risk of a claim by the worker in respect of loss arising in consequence of the advice,

- (e) the agreement must identify the adviser, and
 - (f) the agreement must state that the conditions regulating compromise agreements under this Act are satisfied.
- (6) A person is a relevant independent adviser for the purposes of subsection (5)(c) if that person—
- (a) is a qualified lawyer,
 - (b) is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union,
 - (c) works at an advice centre (whether as an employee or a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre, or
 - (d) is a person of a description specified in an order made by the Department.
- (7) But a person is not a relevant independent adviser for the purposes of subsection (5)(c) in relation to the worker—
- (a) if the person is employed by, or is acting in the matter for, the employer or an associated employer,
 - (b) in the case of a person within subsection (6)(b) or (c), if the trade union or advice centre is the employer or an associated employer,
 - (c) in the case of a person within subsection (6)(c), if the worker makes a payment for the advice received from the person, or
 - (d) in the case of a person of a description specified in an order under subsection (6)(d), if any condition specified in the order in relation to the giving of advice by persons of that description is not satisfied.
- (8) In this section “qualified lawyer” means—
- (a) a barrister (whether in practice as such or employed to give legal advice), or
 - (b) a solicitor who holds a practising certificate.
- (9) For the purposes of this section any two employers are associated if—
- (a) one is a company of which the other (directly or indirectly) has control, or
 - (b) both are companies of which a third person (directly or indirectly) has control,
- and “associated employer” is to be read accordingly.