
STATUTORY RULES OF NORTHERN IRELAND

2016 No. 242

The Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016

PART 2

Posted Workers in the Construction Sector

Scope of application of this Part

3.—(1) This regulation and regulations 4 to 7 apply to a posted worker in the construction sector who—

- (a) is working or has worked in Northern Ireland; and
- (b) is working or has worked for the employer to perform services that relate to the employer's contractual obligations to the contractor.

(2) For the purposes of this regulation and regulations 4 to 7—

“contractor” means a person with whom the employer has contracted to provide services;

“employer” means a service provider established in a Member State which posts or hires out workers in accordance with paragraph 3 of Article 1 of [Directive 96/71/EC](#);

“posted worker in the construction sector” means a worker who—

- (a) normally works in a Member State other than the United Kingdom but, for a limited period, carries out work on behalf of the employer in Northern Ireland; and
- (b) undertakes building work relating to the construction, repair, upkeep, alteration or demolition of buildings including any of the following—
 - (i) excavation;
 - (ii) earthmoving;
 - (iii) actual building work;
 - (iv) assembly and dismantling of prefabricated elements;
 - (v) fitting out or installations;
 - (vi) alterations;
 - (vii) renovation;
 - (viii) repairs;
 - (ix) dismantling;
 - (x) demolition;
 - (xi) maintenance;
 - (xii) upkeep, painting and cleaning work; and
 - (xiii) improvements.

Right not to suffer unauthorised deductions

4.—(1) This regulation applies if a posted worker in the construction sector is remunerated by the employer for any pay reference period commencing on or after the date these Regulations come into operation at a rate that is less than the national minimum wage.

(2) The contractor is to be treated for the purpose of these Regulations as having made an unauthorised deduction of the relevant sum from the worker's wages.

(3) In this regulation and in regulation 5 the "relevant sum" means the proportion of the amount due to the worker as additional remuneration in respect of the pay reference period, calculated in accordance with section 17 of the National Minimum Wage Act 1998⁽¹⁾ (non-compliance: worker entitled to additional remuneration), which is the same as the proportion of the pay reference period during which the worker carried out work relating to the employer's obligations to the contractor.

(4) In this regulation—

"national minimum wage" has the same meaning as in the National Minimum Wage Act 1998;

"pay reference period" has the meaning given by regulation 6 of the National Minimum Wage Regulations 2015⁽²⁾.

Complaints to industrial tribunals

5.—(1) A posted worker in the construction sector may present a complaint against a contractor to an industrial tribunal that the contractor is to be treated as having made an unauthorised deduction of the relevant sum from the worker's wages by virtue of regulation 4(2).

(2) Paragraph (1) does not apply to a posted worker in the construction sector who has—

(a) presented a claim against the employer under Article 55 (1)(a) of the Employment Rights (Northern Ireland) Order 1996⁽³⁾ (deductions from worker's wages in contravention of Article 45 of that Order) to an industrial tribunal in respect of the sum due; or

(b) commenced other civil proceedings against the employer for the recovery, on a claim in contract, of the sum due.

(3) In any complaint brought under paragraph (1), it is a defence for the contractor to show that it exercised all due diligence to ensure that the worker's employer would remunerate the worker in respect of the relevant sum due to the worker.

(4) Subject to paragraph (6) an industrial tribunal must not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning with the date of payment of the relevant wages from which the deduction was made.

(5) Where a complaint is brought under this regulation in respect of a series of deductions, the reference in paragraph (4) to the deduction is to the last deduction in the series.

(6) Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this regulation to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(7) A posted worker in the construction sector who presents a complaint under this regulation is prohibited from—

(a) presenting a complaint against the employer under Article 55(1)(a) of the Employment Rights (Northern Ireland) Order 1996 (deductions from worker's wages in contravention of Article 45 of that Order) to an industrial tribunal in respect of the sum due; or

(1) 1998 c. 39; section 17 was amended by section 8 of the Employment Act 2008 (c. 24).

(2) S.I.2015/621.

(3) S.I.1996/1919 (N.I. 16)

(b) commencing other civil proceedings against the employer for the recovery, on a claim in contract, of the sum due,
unless the tribunal dismisses the complaint under this regulation in accordance with paragraph (3).

Determination of complaints

6.—(1) Where a tribunal finds a complaint under regulation 5 well-founded, it must make a declaration to that effect and must order the contractor to pay to the worker the relevant sum treated as deducted by the contractor from the worker's wages.

(2) Where a tribunal makes a declaration under paragraph (1), it may order the contractor to pay to the worker (in addition to any amount ordered to be paid under that paragraph) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by the worker which is attributable to the matter complained of.

(3) Where, in the case of a complaint made under regulation 5, a tribunal finds that, although neither of the conditions set out in Article 45(1)(a) and (b) of the Employment Rights (Northern Ireland) Order 1996 was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction must for the purposes of paragraph (1) be treated as reduced by the amount with respect to which that condition was satisfied.

(4) A tribunal may not order a contractor to pay or to repay to the worker any amount in respect of a deduction, or in respect of any combination of deductions, in so far as it appears to the tribunal that the contractor or the worker's employer has already paid or repaid any such amount to the worker.

Restrictions on contracting out

7.—(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

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

(2) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

(3) For the purposes of paragraph (2) the conditions regulating compromise agreements under these Regulations are that—

- (a) the agreement must be in writing;
- (b) the agreement must relate to the particular complaint;
- (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 the ability of the worker to pursue the worker's 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 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 these Regulations are satisfied.

(4) For the purposes of paragraph (3)(c) a "relevant independent adviser" is a person who is any of the following—

- (a) a qualified lawyer;
- (b) 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) an advice centre worker (including a volunteer) who has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre,

but this is subject to paragraph (5).

(5) A person is not a relevant independent adviser for the purposes of paragraph (3)(c) in relation to the worker in any of the following cases—

- (a) if the person is, is employed by, or is acting in the matter for, the employer or an associated employer;
- (b) in the case of a person within paragraph (4)(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 paragraph (4)(c), if the worker makes a payment for the advice received.

(6) In paragraph (4)(a) “qualified lawyer” means any of the following—

- (a) as respects Northern Ireland a barrister within the meaning of section 46(2) of the Interpretation Act (Northern Ireland) 1954⁽⁴⁾ or a solicitor within the meaning of Art 4 of the Solicitors (NI) Order 1976 ⁽⁵⁾
- (b) as respects England and Wales a person who, for the purposes of the Legal Services Act 2007⁽⁶⁾, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act), and
- (c) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.

(7) In paragraph (4)(b) “independent trade union” means a trade union (within the meaning given by Article 3 of the Industrial Relations (Northern Ireland) Order 1992⁽⁷⁾) which—

- (a) is not under the domination or control of an employer or a group of employers or of one or more employers’ associations, and
- (b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatever) tending towards such control.

(8) For the purposes of paragraph (5) 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.

(4) 1954 c. 33(N.I.)

(5) S.I 1976/582 (N.I. 12)

(6) 2007 c. 29

(7) S.I. 1992/807 (N.I. 5)