
STATUTORY INSTRUMENTS

2004 No. 3426

The Information and Consultation of Employees Regulations 2004

PART VIII

PROTECTIONS FOR INFORMATION AND CONSULTATION REPRESENTATIVES, ETC.

Right to time off for information and consultation representatives, etc.

27.—(1) An employee who is—

- (a) a negotiating representative; or
- (b) an information and consultation representative,

is entitled to be permitted by his employer to take reasonable time off during the employee's working hours in order to perform his functions as such a representative.

(2) For the purposes of this regulation, the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

Right to remuneration for time off under regulation 27

28.—(1) An employee who is permitted to take time off under regulation 27 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(2) Chapter II of Part XIV of the 1996 Act (a week's pay) shall apply in relation to this regulation as it applies in relation to section 62 of the 1996 Act.

(3) The appropriate hourly rate, in relation to an employee, is the amount of one week's pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when time is taken.

(4) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week's pay shall be divided instead by—

- (a) the average number of normal working hours calculated by dividing by twelve the total number of the employee's normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time is taken off; or
- (b) where the employee has not been employed for a sufficient period to enable the calculations to be made under sub-paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in paragraph (5) as are appropriate in the circumstances.

(5) The considerations referred to in paragraph (4)(b) are—

- (a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of his contract; and

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- (b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.
- (6) A right to any amount under paragraph (1) does not affect any right of an employee in relation to remuneration under his contract of employment (“contractual remuneration”).
- (7) Any contractual remuneration paid to an employee in respect of a period of time off under regulation 27 goes towards discharging any liability of the employer to pay remuneration under paragraph (1) in respect of that period, and, conversely, any payment of remuneration under paragraph (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

Right to time off: complaint to tribunals

- 29.**—(1) An employee may present a complaint to an employment tribunal that his employer—
- (a) has unreasonably refused to permit him to take time off as required by regulation 27; or
 - (b) has failed to pay the whole or part of any amount to which the employee is entitled under regulation 28.
- (2) A tribunal shall not consider a complaint under this regulation unless it is presented—
- (a) before the end of the period of three months beginning with the day on which the time off was taken or on which it is alleged the time off should have been permitted; 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 a complaint under this regulation well-founded, the tribunal shall make a declaration to that effect.
- (4) If the complaint is that the employer has unreasonably refused to permit the employee to take time off, the tribunal shall also order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled under regulation 28 if the employer had not refused.
- (5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under regulation 28, the tribunal shall also order the employer to pay to the employee the amount it finds due to him.

Unfair dismissal

- 30.**—(1) An employee who is dismissed and to whom paragraph (2) or (5) applies shall be regarded, if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in, respectively, paragraph (3) or (6), as unfairly dismissed for the purposes of Part 10 of the 1996 Act.
- (2) This paragraph applies to an employee who is—
- (a) an employees' representative;
 - (b) a negotiating representative;
 - (c) an information and consultation representative; or
 - (d) a candidate in an election in which any person elected will, on being elected, be such a representative.
- (3) The reasons are that—
- (a) the employee performed or proposed to perform any functions or activities as such a representative or candidate;

- (b) the employee exercised or proposed to exercise an entitlement conferred on the employee by regulation 27 or 28; or
- (c) the employee (or a person acting on his behalf) made or proposed to make a request to exercise such an entitlement.

(4) Paragraph (1) does not apply in the circumstances set out in paragraph (3)(a) where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 25, unless the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act.

(5) This paragraph applies to any employee whether or not he is an employee to whom paragraph (2) applies.

(6) The reasons are that the employee—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce a right or secure an entitlement conferred on him by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or to exercise the right to appeal in connection with any rights conferred by these Regulations;
- (c) requested, or proposed to request, data in accordance with regulation 5;
- (d) acted with a view to securing that an agreement was or was not negotiated or that the standard information and consultation provisions did or did not become applicable;
- (e) indicated that he supported or did not support the coming into existence of a negotiated agreement or the application of the standard information and consultation provisions;
- (f) stood as a candidate in an election in which any person elected would, on being elected, be a negotiating representative or an information and consultation representative;
- (g) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (h) voted in such a ballot;
- (i) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (j) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (i).

(7) It is immaterial for the purpose of paragraph (6)(a)—

- (a) whether or not the employee has the right or entitlement; or
- (b) whether or not the right has been infringed;

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

Subsidiary provisions relating to unfair dismissal

31.—(1) In section 105 of the 1996 Act (redundancy as unfair dismissal)—

- (a) in subsection (1)(c) (which requires one of a specified group of subsections to apply for a person to be treated as unfairly dismissed) ^{M1} for "(7F) or (7G)" substitute "(7F), (7G) or (7H)" and
- (b) after subsection (7G) insert—

"(7H) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or

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(6) of regulation 30 of the Information and Consultation of Employees Regulations 2004 (read with paragraphs (4) and (7) of that regulation).”.

(2) In section 108^{M2} of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)^{M3}—

- (a) the word “or” at the end of paragraph (j) is repealed; and
- (b) after paragraph (k) insert—

“or

(1) paragraph (3) or (6) of regulation 30 of the Information and Consultation of Employees Regulations 2004 (read with paragraphs (4) and (7) of that regulation) applies.”.

(3) In section 109 of the 1996 Act (exclusion of right: upper age limit) in subsection (2) (cases where upper age limit does not apply)^{M4}—

- (a) the word “or” at the end of paragraph (j) is repealed; and
- (b) after paragraph (k) insert—

“or

(1) paragraph (3) or (6) of regulation 30 of the Information and Consultation of Employees Regulations 2004 (read with paragraphs (4) and (7) of that regulation) applies.”.

Marginal Citations

- M1** Section 105 has been amended on a number of occasions to specify additional circumstances in which an employee dismissed by reason of redundancy is to be regarded as unfairly dismissed.
- M2** Section 108(1) was amended by S.I. 1999/1436, Article 3.
- M3** Section 108(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.
- M4** Section 109(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

Detriment

32.—(1) An employee to whom paragraph (2) or (5) applies has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer, done on a ground specified in, respectively, paragraph (3) or (6).

(2) This paragraph applies to an employee who is—

- (a) an employees' representative;
- (b) a negotiating representative;
- (c) an information and consultation representative; or
- (d) a candidate in an election in which any person elected will, on being elected, be such a representative.

(3) The ground is that—

- (a) the employee performed or proposed to perform any functions or activities as such a representative or candidate;
- (b) the employee exercised or proposed to exercise an entitlement conferred on the employee by regulation 27 or 28; or

(c) the employee (or a person acting on his behalf) made or proposed to make a request to exercise such an entitlement.

(4) Paragraph (1) does not apply in the circumstances set out in paragraph (3)(a) where the ground (or principal ground) for the subjection to detriment is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 25, unless the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act.

(5) This paragraph applies to any employee whether or not he is an employee to whom paragraph (2) applies.

(6) The grounds are that the employee—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce a right or secure an entitlement conferred on him by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or to exercise the right to appeal in connection with any rights conferred by these Regulations;
- (c) requested, or proposed to request, data in accordance with regulation 5;
- (d) acted with a view to securing that an agreement was or was not negotiated or that the standard information and consultation provisions did or did not become applicable;
- (e) indicated that he supported or did not support the coming into existence of a negotiated agreement or the application of the standard information and consultation provisions;
- (f) stood as a candidate in an election in which any person elected would, on being elected, be a negotiating representative or an information and consultation representative;
- (g) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (h) voted in such a ballot;
- (i) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (j) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (i).

(7) It is immaterial for the purpose of paragraph (6)(a)—

- (a) whether or not the employee has the right or entitlement; or
- (b) whether or not the right has been infringed,

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

(8) This regulation does not apply where the detriment in question amounts to dismissal.

Detriment: enforcement and subsidiary provisions

33.—(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of regulation 32.

(2) The provisions of sections 48(2) to (4) and 49(1) to (5) of the 1996 Act^{M5} (complaints to employment tribunals and remedies) shall apply in relation to a complaint under this regulation as they apply in relation to a complaint under section 48 of the Act but taking references to the employer as references to the employer within the meaning of regulation 32(1) above.

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Marginal Citations

M5 Sections 48 and 49 were amended respectively by sections 1(2)(b) and 1(2)(a) of the [Employment Rights \(Dispute Resolution\) Act 1998 \(c. 8\)](#); there have been other amendments not relevant to these Regulations.

Conciliation

34. In section 18 of the Employment Tribunals Act 1996 (conciliation) in subsection (1) (which specifies the proceedings and claims to which the section applies) ^{M6}—

- (a) the word “or” at the end of paragraph (m) is repealed;
- (b) in the paragraph (n) relating to regulation 19 of the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004, for “(n)” substitute “ (o) ”; and
- (c) after paragraph (o) insert—
“or
(p) under regulation 29 or 33 of the Information and Consultation of Employees Regulations 2004.”.

Marginal Citations

M6 1996 c. 17. Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

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