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## STATUTORY INSTRUMENTS

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# 2009 No. 2401

## The European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009

### PART 8

#### PROTECTION FOR MEMBERS OF SPECIAL NEGOTIATING BODY ETC.

##### **Right to time off for members of special negotiating body etc.**

**26.**—(1) Where an employee is any of the following—

- (a) a member of a special negotiating body,
- (b) a member of a representative body,
- (c) an information and consultation representative,
- (d) an employee member on a supervisory or administrative organ,
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or a representative,

the employee is entitled to be permitted by the employer to take reasonable time off during working hours in order to perform functions as such a member, representative or candidate.

(2) In this regulation “working hours” means any time when, in accordance with the employee's contract of employment, the employee is required to be at work.

##### **Right to remuneration for time off under regulation 26**

**27.**—(1) An employee who is permitted to take time off under regulation 26 is entitled to be paid remuneration by the employer for the time taken off at the appropriate hourly rate.

(2) Chapter 2 of Part 14 of the Employment Rights Act 1996 (a week's pay)<sup>M1</sup> applies in relation to this regulation as it applies in relation to section 62 of that 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 the 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 is to 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 off is taken, or
  - (b) where the employee has not been employed for a sufficient period to enable the calculation 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 are—

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- (a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of the contract;
  - (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 the employee's contract of employment.
- (7) But—
- (a) any contractual remuneration paid to an employee in respect of a period of time off under regulation 26 goes towards discharging any liability of the employer to pay remuneration under paragraph (1) in respect of that period, and
  - (b) 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.

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#### Marginal Citations

**M1** 1996 c.18.

#### Right to time off: complaints to tribunals

- 28.**—(1) An employee may present a complaint to an employment tribunal that the employer—
- (a) has unreasonably refused to permit the employee to take time off as required under regulation 26, or
  - (b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 27.
- (2) A tribunal must 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.
- [<sup>F1</sup>(2A) Regulation 28A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (2).]
- (3) Where a tribunal finds a complaint under this regulation well-founded, the tribunal must 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 must also order the employer to pay to the employee an amount equal to the remuneration to which the employee would have been entitled under regulation 27 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 the employee is entitled under regulation 27, the tribunal must also order the employer to pay to the employee the amount which it finds is due to the employee.

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### Textual Amendments

- F1** Reg. 28(2A) inserted (6.4.2014) by The Enterprise and Regulatory Reform Act 2013 (Consequential Amendments) (Employment) Order 2014 (S.I. 2014/386), art. 1, **Sch. para. 58**

## [<sup>F2</sup>Extension of time limit to facilitate conciliation before institution of proceedings

**28A.**—(1) In this regulation—

- (a) Day A is the day on which the worker concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
- (b) Day B is the day on which the worker concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(2) In working out when the time limit set by regulation 28(2)(a) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(3) If the time limit set by regulation 28(2)(a) would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(4) The power conferred on the employment tribunal by regulation 28(2)(b) to extend the time limit set by paragraph (2)(a) of that regulation is exercisable in relation to that time limit as extended by this regulation.]

### Textual Amendments

- F2** Reg. 28A inserted (6.4.2014) by The Enterprise and Regulatory Reform Act 2013 (Consequential Amendments) (Employment) Order 2014 (S.I. 2014/386), art. 1, **Sch. para. 59**

## Unfair dismissal

**29.**—(1) An employee who is dismissed is to be regarded as unfairly dismissed for the purposes of Part 10 of the Employment Rights Act 1996 if—

- (a) paragraph (2) applies to the employee and the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3), or
- (b) paragraph (5) applies to the employee and the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (6).

(2) This paragraph applies to an employee who is any of the following—

- (a) a member of a special negotiating body;
- (b) a member of a representative body;
- (c) an information and consultation representative;
- (d) an employee member in a supervisory or administrative organ;
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or a representative.

(3) The reasons are—

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- (a) that the employee performed, or proposed to perform, any functions or activities as such a member, representative or candidate (but see paragraph (4));
  - (b) that the employee, or a person acting on behalf of the employee, made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 26 or 27.
- (4) Paragraph (3)(a) does not apply if—
- (a) the reason (or principal reason) for the dismissal is that, in the performance or purported performance of the employee's functions or activities, the employee has disclosed any information or document in breach of the duty in regulation 24, and
  - (b) the case is not one where the employee reasonably believed the disclosure to be a “protected disclosure” within the meaning given by section 43A of the Employment Rights Act 1996.
- (5) This paragraph applies to any employee (whether or not paragraph (2) also applies).
- (6) The reasons are that the employee did any of the following—
- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on the employee 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 exercised, or proposed to exercise, the right to appeal in connection with any rights conferred by these Regulations;
  - (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;
  - (d) indicated that the employee did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
  - (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or a representative body, an employee member on a supervisory or administrative organ, or an information and consultation representative;
  - (f) 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;
  - (g) voted in such a ballot;
  - (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted;
  - (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).
- (7) It is immaterial for the purposes of sub-paragraph (a) of paragraph (6)—
- (a) whether or not the employee has the right, 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**

**30.**—(1) In section 105 of the Employment Rights Act 1996 (redundancy as unfair dismissal) in subsection (1)(c) (which requires one of subsections (2A) to (7K) to apply for a person to be treated as unfairly dismissed) <sup>M2</sup> for “(7K)” substitute “(7L)”.

(2) After subsection (7K) of that section insert—

“(7L) 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 (6) of regulation 29 of the European Public Limited-Liability Company (Employee Involvement)

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(Great Britain) Regulations 2009(S.I. 2009/2401) (read with paragraphs (4) and (7) of that regulation).”.

(3) In section 108 of the Employment Rights Act 1996 (exclusion of right: qualifying period of employment) <sup>M3</sup> in subsection (3) (cases where no qualifying period of employment is required) <sup>M4</sup>omit “or” immediately preceding paragraph (p) and after that paragraph insert—

“, or

(q) paragraph (1)(a) or (b) of regulation 29 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009(S.I. 2009/2401) applies.”.

#### Marginal Citations

- M2** 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.
- M3** Section 108(1) was amended by [S.I. 1999/1436](#), [article 3](#).
- M4** Section 108(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

#### Detriment

**31.**—(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 the employer, done on a ground specified in, respectively, paragraph (3) or (6).

(2) This paragraph applies to an employee who is any of the following—

- (a) a member of a special negotiating body;
- (b) a member of a representative body;
- (c) an information and consultation representative;
- (d) an employee member on a supervisory or administrative organ;
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or representative.

(3) The grounds are—

- (a) that the employee performed or proposed to perform any functions or activities as such a member, representative or candidate (but see paragraph (4));
- (b) that the employee, or a person acting on behalf of the employee, made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 26 or 27.

(4) Paragraph (3)(a) does not apply if—

- (a) the ground for the subjection to detriment is that in the performance, or purported performance, of the employee's functions or activities the employee has disclosed any information or document in breach of the duty in regulation 24, and
- (b) the case is not one where the employee reasonably believed the disclosure to be a “protected disclosure” within the meaning given by section 43A of the Employment Rights Act 1996.

(5) This paragraph applies to any employee (whether or not paragraph (2) also applies).

(6) The grounds are that the employee did any of the following—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on the employee by these Regulations;

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- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or exercised, or proposed to exercise, the right to appeal in connection with any rights conferred by these Regulations;
  - (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;
  - (d) indicated that the employee did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
  - (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body or a representative body, an employee member on a supervisory or administrative organ, or an information and consultation representative;
  - (f) 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;
  - (g) voted in such a ballot;
  - (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted;
  - (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).
- (7) It is immaterial for the purposes of sub-paragraph (a) of paragraph (6)—
- (a) whether or not the employee has the right, 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**

**32.—**(1) An employee may present a complaint to an employment tribunal that the employee has been subjected to a detriment in contravention of regulation 31.

(2) The provisions of section 48(2) to (4) of the Employment Rights Act 1996 (complaints to employment tribunals) <sup>M5</sup> apply in relation to a complaint under this regulation as they apply in relation to a complaint under section 48 of that Act but taking references in those provisions to the employer as references to the employer within the meaning of regulation 31(1).

(3) The provisions of section 49(1) to (5) of the Employment Rights Act 1996 (remedies) <sup>M6</sup> apply in relation to a complaint under this regulation.

#### **Marginal Citations**

**M5** Section 48(3) was amended by section 1(2)(a) of the [Employment Rights \(Dispute Resolution\) Act 1998 \(c.8\)](#).

**M6** Subsections (1) to (5) of section 49 have been amended by section 4(2) of the [Public Interest Disclosure Act 1996 \(c.18\)](#), [section 1\(2\)\(a\)](#) of the [Employment Rights \(Dispute Resolution\) Act 1998](#) and by regulation 31 of [S.I. 1988/1833](#).

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## Conciliation

**33.** In section 18 of the Employment Tribunals Act 1996 (conciliation) <sup>M7</sup>, in subsection (1) (which specifies the proceedings and claims to which the section applies) omit “or” immediately preceding paragraph (u) and after that paragraph insert—

“, or

(v) under regulation 28 or 32 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009(S.I. 2009/2401).”.

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### Marginal Citations

**M7** 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.

**Changes to legislation:**

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**Changes and effects yet to be applied to :**

- Regulations applied by Regulation (EC) No. 2157/2001, Art. 1(4) (as substituted) by [S.I. 2018/1298 reg. 98\(c\)](#)
- Regulations applied by Regulation (EC) No. 2157/2001, Art. 12(4) (as amended) by [S.I. 2018/1298 reg. 107\(b\)](#)
- Regulations applied by Regulation (EC) No. 2157/2001, Art. 40(2) (as amended) by [S.I. 2018/1298 reg. 113\(b\)](#)
- Regulations applied by Regulation (EC) No. 2157/2001, Art. 43(2) (as amended) by [S.I. 2018/1298 reg. 115\(b\)\(iv\)](#)
- Regulations applied by Regulation (EC) No. 2157/2001, Art. 52(b) (as amended) by [S.I. 2018/1298 reg. 122\(a\)](#)
- Regulations applied by Regulation (EC) No. 2157/2001, Art. 9(1)(c)(i) (as substituted) by [S.I. 2018/1298 reg. 104\(a\)\(ii\)](#)
- Regulations applied by Regulation (EC) No. 2157/2001, Art.AA1 (as inserted) by [S.I. 2018/1298 reg. 97](#)

**Changes and effects yet to be applied to the whole Instrument associated Parts and Chapters:**

- Blanket amendment words substituted by [S.I. 2011/1043 art. 3-68-10](#)

Whole provisions yet to be inserted into this Instrument (including any effects on those provisions):

- reg. 3(2A) inserted by [S.I. 2018/1298 reg. 49\(c\)](#)
- reg. 17(4)(d) inserted by [S.I. 2018/1298 reg. 52\(c\)\(iii\)](#)
- reg. 20(3)(b) words substituted by [S.I. 2018/1298 reg. 54\(b\)](#)
- reg. 24(1)(aa) inserted by [S.I. 2018/1298 reg. 57\(a\)](#)
- reg. 41(2A) inserted by [S.I. 2018/1298 reg. 64\(b\)](#)