

2006 No. 177

EMPLOYMENT

**The Service Provision Change (Protection of Employment)
Regulations (Northern Ireland) 2006**

Made - - - - - *3rd April 2006*

Coming into operation - - - - - *6th April 2006*

The Department for Employment and Learning(a) makes the following Regulations in exercise of the powers conferred on it by section 2(2) of the European Communities Act 1972(b) (being a Department designated for the purposes of that section in relation to rights and obligations relating to employers and employees on the transfer or merger of undertakings, businesses or parts of businesses(c)) and Articles 37(2) and 39(3) of the Employment Relations (Northern Ireland) Order 1999(d), and now vested in it(e):

Citation and commencement

1. These Regulations may be cited as the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 and shall come into operation on 6th April 2006.

Interpretation

2.—(1) In these Regulations—

“assigned” means assigned other than on a temporary basis;

“collective agreement”, “collective bargaining” and “trade union” have the same meanings respectively as in the 1992 Order;

“contract of employment” means any agreement between an employee and his employer determining the terms and conditions of his employment;

“employee” means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person’s employer shall be construed accordingly;

“insolvency practitioner” has the meaning given to the expression by Article 3 of the Insolvency (Northern Ireland) Order 1989(f);

“recognised” has the meaning given to the expression by Article 39(2) of the 1992 Order;

“service provision change” means a service provision change to which these Regulations apply by virtue of regulations 3 and 21;

(a) Formerly the Department of Higher and Further Education, Training and Employment; *see* 2001 c. 15 (N.I.)
(b) 1972 c. 68
(c) *See* the European Communities (Designation) (No.2) Order 1977 (S.I. 1977/1718)
(d) S.I. 1999/2790 (N.I. 9)
(e) *See* S.R. 1999 No. 481
(f) S.I. 1989/2405 (N.I. 19)

“the transferor” in relation to any service provision change means the person who carried out the activities to which the change relates prior to that change and “transferee” means the person who carries out the activities as a result of the change;

“the 1992 Order” means the Industrial Relations (Northern Ireland) Order 1992(a);

“the 1996 Order” means the Employment Rights (Northern Ireland) Order 1996(b);

“the 1996 Tribunals Order” means the Industrial Tribunals (Northern Ireland) Order 1996(c).

(2) In these Regulations, references to “organised grouping of employees” shall include a single employee.

(3) For the purposes of these Regulations the representative of a trade union recognised by an employer is an official or other person authorised to carry on collective bargaining with that employer by that trade union.

(4) The Interpretation Act (Northern Ireland) 1954 (d) shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

Service provision change

3.—(1) These Regulations apply to a service provision change, that is a situation in which—

- (a) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”);
- (b) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or
- (c) activities cease to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (2) are satisfied.

(2) The conditions referred to in paragraph (1) are that—

- (a) immediately before the service provision change—
 - (i) there is an organised grouping of employees situated in Northern Ireland which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
 - (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
- (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.

(3) Subject to paragraph (1), these Regulations apply to—

- (a) public and private undertakings engaged in economic activities whether or not they are operating for gain;
- (b) a service provision change howsoever effected notwithstanding—
 - (i) that the service provision change is governed or effected by the law of a country or territory outside Northern Ireland;
 - (ii) that the employment of persons employed in the organised grouping of employees, is governed by any such law;

(a) S.I. 1992/807 (N.I. 5)
(b) S.I. 1996/1919 (N.I. 16)
(c) S.I. 1996/1921 (N.I. 18)
(d) 1954 c. 33 (N.I.)

(c) a service provision change where persons employed in the business or part transferred ordinarily work outside the United Kingdom.

(4) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a service provision change.

(5) A service provision change—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.

(6) In this regulation “contractor” includes a sub-contractor.

Effect of service provision change on contracts of employment

4.—(1) Except where objection is made under paragraph (7), a service provision change shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the service provision change, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a service provision change—

(a) all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a service provision change, is a reference to a person so employed immediately before the change, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the change is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is—

(a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or

(b) a reason unconnected with the transfer.

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the service provision change shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a service provision change involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

Effect of service provision change on collective agreements

5. Where at the time of a service provision change there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by regulation 4(1) above, then—

- (a) without prejudice to Article 26 of the 1992 Order (collective agreements presumed to be unenforceable in specified circumstances) that agreement, in its application in relation to the employee, shall, after the change, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application in relation to the employee, by or in relation to the transferor before the change, shall, after the change, be deemed to have been done by or in relation to the transferee; and
- (b) any order made in respect of that agreement, in its application in relation to the employee, shall, after the change, have effect as if the transferee were a party to the agreement.

Effect of service provision change on trade union recognition

6.—(1) This regulation applies where, after a service provision change, the organised grouping of resources or employees to which the change relates maintains an identity distinct from the remainder of the transferee's undertaking.

(2) Where before such a change an independent trade union is recognised to any extent by the transferor in respect of employees of any description who in consequence of the change become employees of the transferee, then, after the change—

- (a) the trade union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and
- (b) any agreement for recognition may be varied or rescinded accordingly.

Dismissal of employee because of service provision change

7.—(1) Where either before or after a service provision change, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part XI of the 1996 Order (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

- (a) the transfer itself; or
- (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a service provision change.

(3) Where paragraph (2) applies—

- (a) paragraph (1) shall not apply;
- (b) without prejudice to the application of Article 130(4) of the 1996 Order (test of fair dismissal), the dismissal shall, for the purposes of Articles 130(1) and 170 of that Order (reason for dismissal), be regarded as having been for redundancy where Article 130(2)(c) of that Order applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

(5) Paragraph (1) shall not apply in relation to the dismissal of any employee which was required by reason of the application of section 5 of the Aliens Restriction (Amendment) Act 1919(a) to his employment.

(6) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of Article 126 of the 1996 Order to the dismissal of the employee is excluded by or under any provision of that Order, the 1996 Tribunals Order or the Trade Union and Labour Relations (Consolidation) Act 1992(b) insofar as it extends to Northern Ireland, the 1992 Order or the Trade Union and Labour Relations (Northern Ireland) Order 1995(c).

Insolvency

8.—(1) If at the time of a service provision change the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.

(2) In this regulation “relevant employee” means an employee of the transferor—

- (a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or
- (b) whose employment with the transferor is terminated before the time of the service provision change in the circumstances described in regulation 7(1).

(3) The relevant statutory scheme specified in paragraph (4)(b) shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee’s employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.

(4) In this regulation the “relevant statutory schemes” are—

- (a) Chapter VI of Part XII of the 1996 Order;
- (b) Part XIV of the 1996 Order.

(5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes.

(6) In this regulation “relevant insolvency proceedings” means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.

(7) Regulations 4 and 7 do not apply to any service provision change where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.

(a) 1919 c.92; section 5 was amended by the Former Enemy Aliens (Disabilities Removal) Act 1925 section 1 and Schedule 2, the Merchant Shipping Act 1970 section 100(3) and Schedule 5 and the Merchant Shipping Act 1995 section 314 and Schedule 12.

(b) 1992 c. 52

(c) S.I. 1995/1980 (N.I. 12)

Variations of contract where transferors are subject to relevant insolvency proceedings

9.—(1) If at the time of a service provision change the transferor is subject to relevant insolvency proceedings these Regulations shall not prevent the transferor or transferee (or an insolvency practitioner) and appropriate representatives of assigned employees agreeing to permitted variations.

(2) For the purposes of this regulation “appropriate representatives” are—

- (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or
- (b) in any other case, whichever of the following employee representatives the employer chooses—
 - (i) employee representatives appointed or elected by the assigned employees (whether they make the appointment or election alone or with others) otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to agree permitted variations to contracts of employment on their behalf;
 - (ii) employee representatives elected by assigned employees (whether they make the appointment or election alone or with others) for these particular purposes, in an election satisfying requirements identical to those contained in regulation 14 except those in regulation 14(1)(d).

(3) An individual may be an appropriate representative for the purposes of both this regulation and regulation 13 provided that where the representative is not a trade union representative he is either elected by or has authority from assigned employees (within the meaning of this regulation) and affected employees (as described in regulation 13(1)).

(4) In Article 92 of the 1996 Order (time off for carrying out trade union duties) in paragraph (1), for the full-stop at the end of sub-paragraph (e) there is substituted “;” and after that there is inserted—

- “(f) negotiations with a view to entering into an agreement under regulation 9 of the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 that applies to employees of the employer, or
- (g) the performance on behalf of employees of the employer of functions related to or connected with the making of an agreement under that regulation.”.

(5) Where assigned employees are represented by non-trade union representatives—

- (a) the agreement recording a permitted variation must be in writing and signed by each of the representatives who have made it or, where that is not reasonably practicable, by a duly authorised agent of that representative; and
- (b) the employer must, before the agreement is made available for signature, provide all employees to whom it is intended to apply on the date on which it is to come into effect with copies of the text of the agreement and such guidance as those employees might reasonably require in order to understand it fully.

(6) A permitted variation shall take effect as a term or condition of the assigned employee’s contract of employment in place, where relevant, of any term or condition which it varies.

(7) In this regulation—

“assigned employees” means those employees assigned to the organised grouping of resources or employees that is the subject of a service provision change;

“permitted variation” is a variation to the contract of employment of an assigned employee where the sole or principal reason for it is the service provision change in question itself or a reason connected with the change that is not an economic, technical or organisational reason entailing changes in the workforce;

“relevant insolvency proceedings” has the meaning given to the expression by regulation 8(6).

Pensions

10.—(1) Regulations 4 and 5 shall not apply—

- (a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Social Security Pension (Northern Ireland) Order 1975(a); or
- (b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.

(2) For the purposes of paragraphs (1) and (3), any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall not be treated as being part of the scheme.

(3) An employee whose contract of employment is transferred in the circumstances described in regulation 4(1) shall not be entitled to bring a claim against the transferor for—

- (a) breach of contract; or
- (b) constructive unfair dismissal under Article 127(1)(c) of the 1996 Order,

arising out of a loss or reduction in his rights under an occupational pension scheme in consequence of the transfer, save insofar as the alleged breach of contract or dismissal (as the case may be) occurred prior to the date on which these Regulations took effect.

Notification of employee liability information

11.—(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a service provision change —

- (a) in writing; or
- (b) by making it available to him in a readily accessible form.

(2) In this regulation and in regulation 12 “employee liability information” means—

- (a) the identity and age of the employee;
- (b) those particulars of employment that an employer is obliged to give to an employee pursuant to Article 33 of the 1996 Order;
- (c) information of any—
 - (i) disciplinary procedure taken against an employee;
 - (ii) grievance procedure taken by an employee,within the previous two years, in circumstances where the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004(b) apply;
- (d) information of any court or tribunal case, claim or action—
 - (i) brought by an employee against the transferor, within the previous two years;
 - (ii) that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and
- (e) information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).

(3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.

(4) The duty to provide employee liability information in paragraph (1) shall include a duty to provide employee liability information of any person who would have been employed by the

(a) S.I. 1975/1503 (N.I. 15)
(b) S.R. 2004 No. 521

transferor and assigned to the organised grouping of resources or employees that is the subject of a service provision change immediately before the change if he had not been dismissed in the circumstances described in regulation 7(1), including, where the change is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(5) Following notification of the employee liability information in accordance with this regulation, the transferor shall notify the transferee in writing of any change in the employee liability information.

(6) A notification under this regulation shall be given not less than fourteen days before the service provision change or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter.

(7) A notification under this regulation may be given—

- (a) in more than one instalment;
- (b) indirectly, through a third party.

Remedy for failure to notify employee liability information

12.—(1) On or after a service provision change, the transferee may present a complaint to an industrial tribunal that the transferor has failed to comply with any provision of regulation 11.

(2) An industrial 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 date of the service provision change;
- (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 an industrial tribunal finds a complaint under paragraph (1) well-founded, the tribunal—

- (a) shall make a declaration to that effect; and
- (b) may make an award of compensation to be paid by the transferor to the transferee.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances, subject to paragraph (5), having particular regard to—

- (a) any loss sustained by the transferee which is attributable to the matters complained of; and
- (b) the terms of any contract between the transferor and the transferee relating to the transfer under which the transferor may be liable to pay any sum to the transferee in respect of a failure to notify the transferee of employee liability information.

(5) Subject to paragraph (6), the amount of compensation awarded under paragraph (3) shall be not less than £500 per employee in respect of whom the transferor has failed to comply with a provision of regulation 11, unless the tribunal considers it just and equitable, in all the circumstances, to award a lesser sum.

(6) In ascertaining the loss referred to in paragraph (4)(a) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to any damages recoverable under common law.

(7) Article 20 of the 1996 Tribunals Order (conciliation) shall apply to the right conferred by this regulation and to proceedings under this regulation as it applies to the rights conferred by that Order and the industrial tribunal proceedings mentioned in that Order.

Duty to inform and consult representatives

13.—(1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a service provision change, are to any employees of the transferor or the transferee

(whether or not assigned to the organised grouping of resources or employees that is the subject of a service provision change) who may be affected by the change or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a service provision change to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

- (a) the fact that the change is to take place, the date or proposed date of the change and the reasons for it;
- (b) the legal, economic and social implications of the change for any affected employees;
- (c) the measures which he envisages he will, in connection with the change, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
- (d) if the employer is the transferor, the measures, in connection with the change, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the change by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

- (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or
- (b) in any other case, whichever of the following employee representatives the employer chooses—
 - (i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;
 - (ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the service provision change, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

- (a) consider any representations made by the appropriate representatives; and
- (b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

(10) Where—

- (a) the employer has invited any of the affected employee to elect employee representatives; and
- (b) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the service provision change is taken by the employer or a person controlling the employer.

Election of employee representatives

14.—(1) The requirements for the election of employee representatives under regulation 13(3) are that—

- (a) the employer shall make such arrangements as are reasonably practicable to ensure that the election is fair;
- (b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all affected employees having regard to the number and classes of those employees;
- (c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;
- (d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under regulation 13 to be completed;
- (e) the candidates for election as employee representatives are affected employees on the date of the election;
- (f) no affected employee is unreasonably excluded from standing for election;
- (g) all affected employees on the date of the election are entitled to vote for employee representatives;
- (h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;
- (i) the election is conducted so as to secure that—
 - (i) so far as is reasonably practicable, those voting do so in secret; and
 - (ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of paragraph (1) has been held, one of those elected ceases to act as an employee representative and as a result any affected employees are no longer represented, those employees shall elect another representative by an election satisfying the requirements of paragraph (1)(a), (e), (f) and (i).

Failure to inform or consult

15.—(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an industrial tribunal on that ground—

- (a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

- (b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
- (c) in the case of failure relating to representatives of a trade union, by the trade union; and
- (d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

- (a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and
- (b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) If on a complaint under paragraph (1) a question arises as to whether or not an employee representative was an appropriate representative for the purposes of regulation 13, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees.

(4) On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

(6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

- (a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or
- (b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

(10) An employee may present a complaint to an industrial tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that—

- (a) in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;
- (b) in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.

(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.

(12) An industrial tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—

- (a) in respect of a complaint under paragraph (1), the date on which the service provision change in question is completed; or
- (b) in respect of a complaint under paragraph (10), the date of the tribunal's order under paragraph (7) or (8),

or 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 the period of three months.

Failure to inform or consult: supplemental

16.—(1) Article 247(1) of the 1996 Order (complaint to be sole remedy for breach of relevant rights) and Article 20 of the 1996 Tribunals Order (conciliation) shall apply to the rights conferred by regulation 15 and to proceedings under this regulation as they apply to the rights conferred by those Orders and the industrial tribunal proceedings mentioned in those Orders.

(2) An appeal shall lie and shall lie only to the Court of Appeal on a question of law arising from any decision of, or arising in any proceedings before, an industrial tribunal under or by virtue of these Regulations; and section 11(1) of the Tribunals and Inquiries Act 1992(a) (appeals from certain tribunals to the High Court) shall not apply in relation to any such proceedings.

(3) “Appropriate compensation” in regulation 15 means such sum not exceeding thirteen weeks’ pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

(4) Articles 16 to 24 of the 1996 Order shall apply for calculating the amount of a week’s pay for any employee for the purposes of paragraph (3) and, for the purposes of that calculation, the calculation date shall be—

- (a) in the case of an employee who is dismissed by reason of redundancy (within the meaning of Articles 174 and 190 of the 1996 Order) the date which is the calculation date for the purposes of any entitlement of his to a redundancy payment (within the meaning of those sections) or which would be that calculation date if he were so entitled;
- (b) in the case of an employee who is dismissed for any other reason, the effective date of termination (within the meaning of Articles 127(1) and (2) and 129 of the 1996 Order) of his contract of employment;
- (c) in any other case, the date of the service provision change.

Employers’ liability compulsory insurance

17.—(1) Paragraph (2) applies where—

- (a) by virtue of Article 7(a), 7(aa) or 7(b) of the Employers’ Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972(b) (“the 1972 Order”), the transferor is not required by that Order to effect any insurance; or
- (b) by virtue of Article 7(c) of the 1972 Order, the transferor is exempted from the requirement of that Act to effect insurance.

(2) Where this paragraph applies, on completion of a service provision change the transferor and the transferee shall be jointly and severally liable in respect of any liability referred to in Article 5(1) of the 1972 Order, in so far as such liability relates to the employee’s employment with the transferor.

(a) 1992 c.53; section 11(1) was amended by the Sea Fish (Conservation) Act 1992 (c.60) section 9, the Special Educational Needs and Disability Act 2001 (c.10) section 42(1) and Schedule 8 and S.I. 2001/3649.
 (b) S.I. 1972/963 (N.I. 6)

Restriction on contracting out

18. Article 245 of the 1996 Order (restrictions on contracting out) shall apply in relation to these Regulations as if they were contained in that Order, save for that Article shall not apply in so far as these Regulations provide for an agreement (whether a contract of employment or not) to exclude or limit the operation of these Regulations.

Amendment to the 1996 Order

19. In Article 135 of the 1996 Order (assertion of statutory right) in subsection (4)—

- (a) the word “and” at the end of sub-paragraph (d) is omitted; and
- (b) at the end of sub-paragraph (e), for the full-stop there is substituted “;” and after that there is inserted—
 - “(f) the rights conferred by the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006.”.

Amendments

20.—(1) Schedule 1 (consequential amendments) shall have effect.

(2) Schedule 1 (Application of the Regulations to Northern Ireland) to the Transfer of Undertakings (Protection of Employment) Regulations 2006(a) shall be amended as follows—

(a) for paragraph 8 there is substituted—

“8. In regulation 2—

- (a) for “the 1992 Act” where it first occurs there is substituted “the Industrial Relations (Northern Ireland) Order 1992”;
- (b) for “Part XIII of the Insolvency Act 1986” there is substituted “Article 3 of the Insolvency (Northern Ireland) Order 1989(b)”;
- (c) for “section 178(3) of the 1992 Act” there is substituted “Article 39(2) of the Industrial Relations (Northern Ireland) Order 1992”.

(b) for paragraph 10(3) there is substituted—

“(3) In regulation 12—

- (a) for “section 18 of the 1996 Tribunals Act” there is substituted “Article 20 of the Industrial Tribunals (Northern Ireland) Order 1996(c)”;
- (b) for any reference to “Act” there is substituted “Order”.

(c) in paragraph 10 at the end of sub-paragraph (4) there is inserted—

“(5) In regulation 18—

- (a) for the reference to “that Act” there is substituted “that Order”;
- (b) for the reference to “section” there is substituted “Article”.

(6) In regulation 19—

- (a) for any reference to “subsection” there is substituted “paragraph”;
- (b) for any reference to “paragraph” there is substituted “sub-paragraph”.

(7) In paragraph (3)(b) of regulation 7 for any reference to “that Act” there is substituted “that Order”.

(d) in column 2 of Table 1—

- (i) for “Article 170(I)” there is substituted “Article 170”; and

(a) S.I. 2006/246

(b) S.I. 1989/2405 (N.I. 19)

(c) S.I. 1996/1921 (N.I.18)

(ii) for “Article 247(I)” there is substituted “Article 247(1)”.

Application

21. (1) These Regulations shall apply in relation to—

- (a) a service provision change that takes place on or after 6 April 2006;
- (b) a service provision change, not falling within sub-paragraph (a), that takes place on or after 6 April 2006 and is regarded by virtue of any statutory provision as a service provision change.

(2) The duty on a transferor to provide a transferee with employee liability information shall not apply in the case of a service provision change that takes place on or before 19 April 2006.

(3) Regulations 13, 14, 15 and 16 shall not apply in the case of a service provision change that is not also a transfer of an undertaking, business or part of an undertaking or business that takes place on or before 4 May 2006.

Sealed with the Official Seal of the Department for Employment and Learning on 3rd April 2006.



D.S.S. McAuley
A senior officer of the
Department for Employment and Learning

CONSEQUENTIAL AMENDMENTS

Industrial Tribunals (Northern Ireland) Order 1996

1. In Article 6 of the Industrial Tribunals (Northern Ireland) Order 1996(a) (composition of a tribunal), in paragraph (3)(ab), after the words “regulation 15(10) of the Transfer of Undertakings (Protection of Employment) Regulations 2006” there is inserted “or regulation 15(10) of the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006”.

Employment Rights (Northern Ireland) Order 1996

2. In each of the following provisions of the Employment Rights (Northern Ireland) Order 1996(b) after the words “regulations 9, 13 and 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006” there is inserted “or regulations 9, 13 and 15 of the Service Provision Change (Protection of Employment) Regulations 2006”—

- (a) Article 70(1)(a) and (1A);
- (b) Article 89(1)(a);
- (c) Article 134(1)(a) and (2).

(a) S.I. 1996/1921 (N.I. 18).
(b) S.I. 1999/1919 (N.I. 16).

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations relate to the treatment of employees, and related matters, in relation to a service provision change, and are made under Article 37(2) of the Employment Relations (Northern Ireland) Order 1999 (“the 1999 Order”).

These Regulations apply to Northern Ireland only. They should be read in conjunction with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“the 2006 Regulations”) (S.I. 2006/246) which make provision, in respect of Northern Ireland, for the treatment of employees, and related matters on the transfer of an undertaking or business. The principal provisions of the Regulations provide as follows—

Regulation 3 defines a service provision change.

Regulation 4 provides that a service provision change shall not operate to terminate the contract of employment of a person employed by the transferor and assigned to the organised grouping of resources or employees subject to a service provision change but that any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee. The transferor’s powers, duties, rights and liabilities under or in connection with that employment contract shall transfer to the transferee. A variation to that employment contract by reason of the transfer is prohibited but that shall not prevent the employer and his employee from agreeing a variation to the contract for a reason unconnected with the transfer or a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce.

Regulation 5 provides that a collective agreement made by a transferor with a recognised trade union shall, after the change, have effect as if made by the transferee with that trade union.

Regulation 6 provides for the transfer of recognition of an independent trade union.

Regulation 7 provides that the dismissal of an employee by reason of the transfer is unlawful but that a dismissal for a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce is potentially lawful.

Regulation 8 applies where, at the time of the transfer, the transferor is subject to relevant insolvency proceedings, as defined in regulation 8(6). It provides that certain of an employer’s pre-existing debts to employees do not pass to the transferee but are instead met by the National Insurance Fund.

Regulation 9 provides greater scope for the transferee to vary, subject to certain requirements, the terms and conditions of employment of transferring employees in circumstances where the transferor is subject to relevant insolvency proceedings.

Regulation 10 provides that regulations 4 and 5 shall not apply to so much of a contract of employment or collective agreement as relates to any provision of an occupational pension scheme relating to old age, survivors or invalidity benefits.

Regulation 11 provides that the transferor shall provide employee liability information in respect of employees assigned to the organised grouping of resources or employees that is subject to a service provision change to the transferee in advance of a service provision change.

Regulation 12 provides a remedy to a transferee for the failure of a transferor to comply with regulation 11.

Regulation 13 imposes a duty on an employer to provide information to appropriate representatives of affected employees about a service provision change and measures he envisages taking in respect of it, long enough before a service provision change to enable the employer to consult those representatives with a view to seeking their agreement to the intended measures.

Regulation 14 makes provision for the election of employee representatives where there is no recognised independent trade union.

Regulations 15 and 16 provide a remedy for a failure of an employer to comply with regulations 13 or 14.

Regulation 20 provides amendments consequential on these Regulations and corrects the 2006 Regulations insofar as they apply to Northern Ireland.

Regulation 21 provides that these Regulations shall apply to a service provision change that takes place on or after 6 April 2006.