

## SCHEDULE

Regulation 17

### Employment rights and protections in connection with consultation

#### 1. In this Schedule—

- “the 1996 Act” means the Employment Rights Act 1996 ;
- “consulted representative” has the meaning given by paragraph 2(2);
- “contract of employment” means a contract of service or apprenticeship whether express or implied and (if it is express) whether oral or in writing;
- “employee” means an individual who has entered into or works under a contract of employment and includes, where the employment has ceased, an individual who worked under a contract of employment;
- “employment”, in relation to an employee, means employment under a contract of employment (and “employed” has a corresponding meaning);
- “employer”, in relation to an employee, means the person by whom the employee is (or where employment has ceased, was) employed.

#### *Right to time off and remuneration*

#### 2.—(1) An employee who—

- (a) is a representative falling within regulation 12(2)(a) or (3) or 13(2), and
- (b) is consulted under these Regulations about a listed change by a relevant employer,

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) In this Schedule “consulted representative” means an employee who satisfies the conditions specified in sub-paragraph (1)(a) and (b).

(3) For the purposes of this paragraph, 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.

3.—(1) An employee who is permitted to take time off under paragraph 2 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(2) Chapter 2 of Part 14 of the 1996 Act (a week's pay) shall apply in relation to this paragraph as it applies in relation to section 62 of the 1996 Act (right to remuneration of certain representatives).

(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 off.

(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 when 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 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 sub-paragraph (5) as are appropriate in the circumstances.

(5) The considerations referred to in sub-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 sub-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 paragraph 2 goes towards discharging any liability of the employer to pay remuneration under sub-paragraph (1) in respect of that period, and, conversely, any payment of remuneration under sub-paragraph (1) in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.
- 4.—(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 paragraph 2, or
  - (b) has failed to pay the whole or part of any amount to which the employee is entitled under paragraph 3.
- (2) A tribunal shall not consider a complaint under this paragraph 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 paragraph 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 paragraph 3 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 paragraph 3, the tribunal shall also order the employer to pay to the employee the amount it finds due to him.

#### *Protections against unfair dismissal*

- 5.—(1) An employee who is dismissed and to whom sub-paragraph (2) or (4) applies shall be regarded, if the reason (or if more than one, the principal reason) for the dismissal is a reason specified in, respectively, sub-paragraph (3) or (5), as unfairly dismissed for the purposes of Part 10 of the 1996 Act (which makes provision as to rights and remedies relating to unfair dismissal).
- (2) This sub-paragraph applies to an employee who is—
- (a) a consulted representative, or
  - (b) a candidate in an election in which any person elected will, on being elected, be a representative of such description as is referred to in regulation 13(2).
- (3) The reasons are that—
- (a) the employee performed or proposed to perform any functions or activities under these Regulations in his capacity as such a representative or candidate,
  - (b) the employee exercised or proposed to exercise an entitlement conferred on the employee by paragraph 2 or 3, or
  - (c) the employee (or a person acting on his behalf) made or proposed to make a request to exercise such an entitlement.

(4) This sub-paragraph applies to any employee who is an active or prospective member of an occupational or personal pension scheme, whether or not he is an employee to whom sub-paragraph (2) applies.

(5) 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 this Schedule,
- (b) complained or proposed to complain to the Regulator that any person falling within regulation 3(1)—
  - (i) has decided to make a listed change affecting an occupational or personal pension scheme in contravention of regulation 6(1), or
  - (ii) has failed to comply with the requirements of regulation 16(2) or (3),
- (c) complained or proposed to complain to the Regulator that any consultation required by these Regulations was not carried out in accordance with the requirements of these Regulations,
- (d) stood as a candidate in an election in which any person elected would, on being elected, be a representative of such description as is referred to in regulation 13(2),
- (e) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in an election arranged under regulation 14,
- (f) voted in such an election,
- (g) expressed doubts, whether to an election supervisor or otherwise, as to whether such an election had been properly conducted, or
- (h) proposed to do, failed to do, or proposed to decline to do any of the things mentioned in paragraphs (d) to (g).

(6) It is immaterial for the purpose of sub-paragraph (5)(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 provision to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

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

- (a) for subsection (1)(c) substitute—
  - “(c) it is shown that any of subsections (2A) to (7I) apply.”; and
- (b) after subsection (7H) insert—

“(7I) 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 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule).”.

(2) In section 108 of the 1996 Act (exclusion of right: qualifying period of employment), in subsection (3)—

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

“, or

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- (m) paragraph 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule) applies.”.
- (3) In section 109 of the 1996 Act (exclusion of right: upper age limit), in subsection (2)—
  - (a) omit the word “or” at the end of paragraph (k); and
  - (b) after paragraph (l) insert—

“, or

- (m) paragraph 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule) applies.”.

*Protections from suffering other detriment in employment*

7.—(1) An employee to whom sub-paragraph (2) or (4) 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, sub-paragraph (3) or (5).

- (2) This sub-paragraph applies to an employee who is—
  - (a) a consulted representative, or
  - (b) a candidate in an election in which any person elected will, on being elected, be a representative of such description as is referred to in regulation 13(2).
- (3) The grounds are that—
  - (a) the employee performed or proposed to perform any functions or activities under these Regulations in his capacity as such a representative or candidate,
  - (b) the employee exercised or proposed to exercise an entitlement conferred on the employee by paragraph 2 or 3, or
  - (c) the employee (or a person acting on his behalf) made or proposed to make a request to exercise such an entitlement.
- (4) This sub-paragraph applies to any employee who is an active or prospective member of an occupational or personal pension scheme, whether or not he is an employee to whom sub-paragraph (2) applies.
- (5) 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 this Schedule,
  - (b) complained or proposed to complain to the Regulator that any person falling within regulation 3(1)—
    - (i) has decided to make a listed change affecting an occupational or personal pension scheme in contravention of regulation 6(1), or
    - (ii) has failed to comply with the requirements of regulation 16(2) or (3),
  - (c) complained or proposed to complain to the Regulator that any consultation required by these Regulations was not carried out in accordance with the requirements of these Regulations,
  - (d) stood as a candidate in an election in which any person elected would, on being elected, be a representative of such description as is referred to in regulation 13(2),
  - (e) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in an election arranged under regulation 14,

- (f) voted in such a election,
  - (g) expressed doubts, whether to an election supervisor or otherwise, as to whether such an election had been properly conducted, or
  - (h) proposed to do, failed to do, or proposed to decline to do any of the things mentioned in paragraphs (d) to (g).
- (6) It is immaterial for the purpose of sub-paragraph (5)(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 provision to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

- (7) This paragraph does not apply where the detriment in question amounts to dismissal.

**8.—(1)** An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of paragraph 7.

(2) The provisions of sections 48(2) to (4) and 49(1) to (5) of the 1996 Act (complaints to employment tribunals and remedies) shall apply in relation to a complaint under this paragraph as they apply in relation to a complaint under section 48 of that Act.

#### *Conciliation and appeals*

**9.** In section 18(1) of the Employment Tribunals Act 1996 (which specifies the proceedings and claims in which conciliation procedures are available)—

- (a) omit the word “or” at the end of paragraph (o); and
- (b) after paragraph (p) insert—

“, or

- (q) under paragraph 4 or 8 of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.”.

**10.** In section 21(1) of the Employment Tribunals Act 1996 (circumstances in which an appeal on a question of law lies to the Employment Appeal Tribunal from an employment tribunal)—

- (a) omit the word “or” at the end of paragraph (p); and
- (b) after paragraph (q) insert—

“, or

- (r) the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.”.

#### *Miscellaneous*

**11.** Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports to exclude or limit the operation of any provision of regulations 6 to 16.

**12.—(1)** Any provision in any agreement (whether an employee's contract or not) is void in so far as it purports—

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

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(2) Sub-paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings before an employment tribunal where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation).

(3) Sub-paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal proceedings within section 18(1) of the Employment Tribunals Act 1996 (which specifies proceedings under these Regulations as being proceedings where conciliation is available ) if the conditions specified in paragraph 13 regulating compromise agreements are satisfied in relation to the agreement.

**13.—**(1) For the purposes of paragraph 12(3) the conditions regulating compromise agreements are that—

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

(2) A person is a relevant independent adviser for the purposes of sub-paragraph (1)(c)—

- (a) if he is a qualified lawyer,
- (b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union, or
- (c) if he works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre.

(3) But a person is not a relevant independent adviser for the purposes of sub-paragraph (1)(c)—

- (a) if he 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 sub-paragraph (2)(b) or (c), if the trade union or advice centre is the employer or an associated employer, or
- (c) in the case of a person within sub-paragraph (2)(c), if the employee makes a payment for the advice received from him.

(4) In sub-paragraph (2)(a) “qualified lawyer” means—

- (a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practising certificate, or a person other than a barrister or a solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990 <sup>M9</sup>);
- (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.

(5) A person shall be treated as being a qualified lawyer within the meaning of sub-paragraph (4)

- (a) if he is a Fellow of the Institute of Legal Executives <sup>M10</sup>[<sup>F1</sup>practising in a solicitor’s practice (including a body recognised under section 9 of the Administration of Justice Act 1985)] .

(6) In this paragraph—

- (a) “independent trade union” has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992 <sup>M11</sup>; and
- (b) for the purposes of sub-paragraph (3) any two employers shall be treated as associated if—
  - (i) one is a company of which the other (directly or indirectly) has control, or
  - (ii) both are companies of which a third person (directly or indirectly) has control,and “associated employer” shall be construed accordingly.

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**Textual Amendments**

**F1** Words in Sch. para. 13(5) substituted (16.12.2009) by [Legal Services Act 2007 \(Consequential Amendments\) Order 2009 \(S.I. 2009/3348\)](#), arts. 2(2), 22, [Sch. 1](#)

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**Marginal Citations**

**M9** [1990 c. 41](#).

**M10** The Institute of Legal Executives is located at Kempston Manor, Kempston, Bedfordshire, MK42 7AB.

**M11** [1992 c. 52](#).

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