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STATUTORY RULES OF NORTHERN IRELAND

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**2011 No. 350**

**EMPLOYMENT**

**THE AGENCY WORKERS REGULATIONS  
(NORTHERN IRELAND) 2011**

*Made* - - - - *5th October 2011*

*Coming into operation* *5th December 2011*

The Department for Employment and Learning being a Department designated for the purposes of section 2(2) of the European Communities Act 1972<sup>(1)</sup> in relation to employment rights and duties<sup>(2)</sup>, makes these Regulations—

- (a) in exercise of the powers conferred by section 2(2) of the European Communities Act 1972 and Articles 17(1), (2) and (5), and 55(2) of, and paragraphs 6, 7 and 14(1) of Schedule 3 to, the Health and Safety at Work (Northern Ireland) Order 1978<sup>(3)</sup>, (“the 1978 Order”); and
- (b) independently of any proposals submitted by the Health and Safety Executive for Northern Ireland under Article 13(1A)(c) of the 1978 Order<sup>(4)</sup>.

The Department for Employment and Learning has consulted the Health and Safety Executive for Northern Ireland and such other bodies as appear to the Department to be appropriate, as required by Article 46(1) of the 1978 Order<sup>(5)</sup>.

**PART 1**

**General and Interpretation**

**Citation and commencement**

**1.** These Regulations may be cited as the Agency Workers Regulations (Northern Ireland) 2011 and shall come into operation on 5th December 2011.

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(1) 1972 c.68

(2) See The European Communities (Designation) Order 2000 (S.I. 2000/738)

(3) S.I. 1978/1039 (N.I.9)

(4) Article 13(1A) (c) was inserted by the Health and Safety (Amendment) (Northern Ireland) Order 1998, S.I. 1998/2795 (N.I.18), Article 4(1) and Schedule 1, paragraph 10

(5) Article 46(1) was amended by S.I. 1998/2795 (N.I. 18), Article 6(1) and Schedule 1, paragraph 18(1)

**Interpretation**

2.—(1) The Interpretation Act (Northern Ireland) 1954<sup>(6)</sup> shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

(2) In these Regulations—

“the 1996 Order” means the Employment Rights (Northern Ireland) Order 1996<sup>(7)</sup>;

“assignment” means a period of time during which an agency worker is supplied by one or more temporary work agencies to a hirer to work temporarily for and under the supervision and direction of the hirer;

“contract of employment” means a contract of service or of 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 or, where the employment has ceased, worked under a contract of employment;

“employer”, in relation to an employee or worker, means the person by whom the employee or worker is (or where the employment has ceased, was) employed;

“employment”—

(a) in relation to an employee, means employment under a contract of employment, and

(b) in relation to a worker, means employment under that worker’s contract,

and “employed” shall be construed accordingly;

“hirer” means a person engaged in economic activity, public or private, whether or not operating for profit, to whom individuals are supplied, to work temporarily for and under the supervision and direction of that person; and

“worker” means an individual who is not an agency worker but who has entered into or works under (or where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual,

and any reference to a worker’s contract shall be construed accordingly.

**The meaning of agency worker**

3.—(1) In these Regulations “agency worker” means an individual who—

(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and

(b) has a contract with the temporary work agency which is—

(i) a contract of employment with the agency, or

(ii) any other contract with the agency to perform work or services personally.

(2) But an individual is not an agency worker if—

(a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or

<sup>(6)</sup> 1954 c.33 (N.I.)

<sup>(7)</sup> S.I. 1996/1919 (N.I.16)

- (b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.
- (3) For the purposes of paragraph (1)(a) an individual shall be treated as having been supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer if—
  - (a) the temporary work agency initiates or is involved as an intermediary in the making of the arrangements that lead to the individual being supplied to work temporarily for and under the supervision and direction of the hirer, and
  - (b) the individual is supplied by an intermediary, or one of a number of intermediaries, to work temporarily for and under the supervision and direction of the hirer.
- (4) An individual treated by virtue of paragraph (3) as having been supplied by a temporary work agency shall be treated, for the purposes of paragraph (1)(b), as having a contract with the temporary work agency.
- (5) An individual is not prevented from being an agency worker because—
  - (a) the temporary work agency supplies the individual through one or more intermediaries;
  - (b) one or more intermediaries supply that individual;
  - (c) the individual is supplied pursuant to any contract or other arrangement between the temporary work agency, one or more intermediaries and the hirer;
  - (d) the temporary work agency pays for the services of the individual through one or more intermediaries; or
  - (e) the individual is employed by or otherwise has a contract with one or more intermediaries.
- (6) Paragraph (5) does not prejudice the generality of paragraphs (1) to (4).

### **The meaning of temporary work agency**

- 4.—(1) In these Regulations “temporary work agency” means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—
- (a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or
  - (b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.
- (2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers.

## **PART 2**

### **Rights**

#### **Rights of agency workers in relation to the basic working and employment conditions**

- 5.—(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—
- (a) other than by using the services of a temporary work agency; and

- (b) at the time the qualifying period commenced.
- (2) For the purposes of paragraph (1), the basic working and employment conditions are —
  - (a) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer,
  - (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,
 whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.
- (3) Paragraph (1) shall be deemed to have been complied with where—
  - (a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and
  - (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.
- (4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—
  - (a) both that employee and the agency worker are—
    - (i) working for and under the supervision and direction of the hirer, and
    - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and
  - (b) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.
- (5) An employee is not a comparable employee if that employee’s employment has ceased.
- (6) This regulation is subject to regulation 10.

### **Relevant terms and conditions**

**6.—(1)** In regulation 5(2) and (3) “relevant terms and conditions” means terms and conditions relating to—

- (a) pay;
- (b) the duration of working time;
- (c) night work;
- (d) rest periods;
- (e) rest breaks; and
- (f) annual leave.

(2) For the purposes of paragraph (1)(a), “pay” means any sums payable to a worker of the hirer in connection with the worker’s employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excluding any payments or rewards within paragraph (3).

- (3) Those payments or rewards are—
  - (a) any payment by way of occupational sick pay;
  - (b) any payment by way of a pension, allowance or gratuity in connection with the worker’s retirement or as compensation for loss of office;

- (c) any payment in respect of maternity, paternity or adoption leave;
  - (d) any payment referable to the worker's redundancy;
  - (e) any payment or reward made pursuant to a financial participation scheme;
  - (f) any bonus, incentive payment or reward which is not directly attributable to the amount or quality of the work done by a worker, and which is given to a worker for a reason other than the amount or quality of work done such as to encourage the worker's loyalty or to reward the worker's long-term service;
  - (g) any payment for time off under Part VII of the 1996 Order<sup>(8)</sup> (payment for time off for carrying out trade union duties etc);
  - (h) a guarantee payment under Article 60 of the 1996 Order;
  - (i) any payment by way of an advance under an agreement for a loan or by way of an advance of pay (but without prejudice to the application of Article 45 of the 1996 Order to any deduction made from the worker's wages in respect of any such advance);
  - (j) any payment in respect of expenses incurred by the worker in carrying out the employment; and
  - (k) any payment to the worker otherwise than in that person's capacity as a worker.
- (4) For the purposes of paragraphs (2) and (3) any monetary value attaching to any payment or benefit in kind furnished to a worker by the hirer shall not be treated as pay of the worker except any voucher or stamp which is—
- (a) of fixed value expressed in monetary terms, and
  - (b) capable of being exchanged (whether on its own or together with other vouchers, stamps or documents, and whether immediately or only after a time) for money, goods or services (or for any combination of two or more of those things).
- (5) In this regulation—
- “financial participation scheme” means any scheme that offers workers of the hirer—
- (a) a distribution of shares or options, or
  - (b) a share of profits in cash or in shares;
- “night time”, in relation to an individual, means—
- (a) a period—
    - (i) the duration of which is not less than seven hours, and
    - (ii) which includes the period between midnight and 5 a.m.,which is determined for the purposes of these Regulations by a working time agreement, or
  - (b) in default of such a determination, the period between 11 p.m. and 6 a.m.;
- “night work” means work during night time;
- “relevant training” means work experience provided pursuant to a training course or programme, training for employment, or both, other than work experience or training—
- (a) the immediate provider of which is an educational institution or a person whose main business is the provision of training, and
  - (b) which is provided on a course run by that institution or person;

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<sup>(8)</sup> Article 93 of the 1996 Order was amended by Article 31(1) and (3) of the Employment (Northern Ireland) Order 2003, *S.I. 2003/2902 (N.I. 15)*

“rest period”, in relation to an individual, means a period which is not working time, other than a rest break or leave to which that individual is entitled either under the Working Time Regulations (Northern Ireland) 1998(9) or under the contract between that individual and the employer of that individual;

“working time”, in relation to an individual means—

- (a) any period during which that individual is working, at the disposal of the employer of that individual and carrying out the activity or duties of that individual,
- (b) any period during which that individual is receiving relevant training, and
- (c) any additional period which is to be treated as working time for the purposes of the Working Time Regulations (Northern Ireland) 1998 under a working time agreement; and

“working time agreement”, in relation to an individual, means a workforce agreement within the meaning of regulation 2(2) of the Working Time Regulations (Northern Ireland) 1998, which applies to the individual any provision of—

- (a) a collective agreement which forms part of a contract between that individual and the employer of that individual, or
- (b) any other agreement in writing which is legally enforceable as between the individual and the employer of that individual.

### **Qualifying period**

7.—(1) Regulation 5 does not apply unless an agency worker has completed the qualifying period.

(2) To complete the qualifying period the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments.

(3) For the purposes of this regulation and regulations 8 and 9, the agency worker works in “the same role” unless—

- (a) the agency worker has started a new role with the same hirer, whether supplied by the same or by a different temporary work agency;
- (b) the work or duties that make up the whole or the main part of that new role are substantively different from the work or duties that made up the whole or the main part of the previous role; and
- (c) the temporary work agency has informed the agency worker in writing of the type of work the agency worker will be required to do in the new role.

(4) For the purposes of this regulation and regulation 10, any week during the whole or part of which an agency worker works during an assignment is counted as a calendar week.

(5) For the purposes of this regulation and regulations 8 and 9, when calculating whether any weeks completed with a particular hirer are continuous, where—

- (a) the agency worker has started working during an assignment, and there is a break, either between assignments or during an assignment, when the agency worker is not working,
- (b) paragraph (8) applies to that break, and
- (c) the agency worker returns to work in the same role with the same hirer,

any continuous weeks during which the agency worker worked for that hirer before the break shall be carried forward and treated as continuous with any weeks during which the agency worker works for that hirer after the break.

(6) For the purposes of this regulation and regulation 8, when calculating the number of weeks during which the agency worker has worked, where the agency worker has—

- (a) started working in a role during an assignment, and
- (b) is unable to continue working for a reason described in paragraph (8)(c) or (8)(d)(i), (ii) or (iii),

for the period that is covered by one or more such reasons, that agency worker shall be deemed to be working in that role with the hirer, for the original intended duration, or likely duration of the assignment, whichever is the longer.

(7) Where—

- (a) an assignment ends on grounds which are maternity grounds within the meaning of Article 100A of the 1996 Order, and

(b) the agency worker is deemed to be working in that role in accordance with paragraph (6), the fact that an agency worker is actually working in another role, whether for the same or a different hirer during the period mentioned in paragraph (6) or any part of that period, does not affect the operation of that paragraph.

(8) This paragraph applies where there is a break between assignments, or during an assignment, when the agency worker is not working and the break is—

- (a) for any reason and the break is not more than six calendar weeks;
- (b) wholly due to the fact that the agency worker is incapable of working in consequence of sickness or injury, and the requirements of paragraph (9) are satisfied;
- (c) related to pregnancy, childbirth or maternity and is at a time in a protected period;
- (d) wholly for the purpose of taking time off or leave, whether statutory or contractual, to which the agency worker is otherwise entitled which is—
  - (i) ordinary, compulsory or additional maternity leave;
  - (ii) ordinary or additional adoption leave;
  - (iii) paternity leave;
  - (iv) time off or other leave not listed in sub-paragraph (d)(i), (ii) or (iii); or
  - (v) for more than one of the reasons listed in sub-paragraph (d)(i) to (iv);
- (e) wholly due to the fact that the agency worker is required to attend at any place in pursuance of being summoned for service as a juror under the Juries (Northern Ireland) Order 1996<sup>(10)</sup>, or the Coroners Act (Northern Ireland) 1959<sup>(11)</sup>, and the break is 28 calendar weeks or less;
- (f) wholly due to a temporary cessation in the hirer's requirement for any worker to be present at the establishment and work in a particular role, for a pre-determined period of time according to the established custom and practices of the hirer;
- (g) wholly due to a strike, lock-out or other industrial action at the hirer's establishment; or
- (h) wholly due to more than one of the reasons listed in sub-paragraphs (b), (c), (d), (e), (f) or (g).

(9) Paragraph (8)(b) only applies where—

- (a) the break is 28 calendar weeks or less;
- (b) paragraph (8)(c) does not apply; and

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<sup>(10)</sup> S.I.1996/1141 (N.I.6)

<sup>(11)</sup> 1959 c.15 (N.I.)

(c) if required to do so by the temporary work agency, the agency worker has provided such written medical evidence as may reasonably be required.

(10) For the purposes of paragraph (8)(c) a protected period begins at the start of the pregnancy, and the protected period associated with any particular pregnancy ends at the end of the 26 weeks beginning with childbirth or, if earlier, when the agency worker returns to work.

(11) For the purposes of paragraph (10) “childbirth” means the birth of a living child or the birth of a child whether living or dead after 24 weeks of pregnancy.

(12) Time spent by an agency worker working during an assignment before 5<sup>th</sup> December 2011 does not count for the purposes of this regulation.

### **Completion of the qualifying period and continuation of the regulation 5 rights**

**8.** Where an agency worker has completed the qualifying period with a particular hirer, the rights conferred by regulation 5 shall apply and continue to apply to that agency worker in relation to that particular hirer unless—

- (a) that agency worker is no longer working in the same role, within the meaning of regulation 7(3), with that hirer; or
- (b) there is a break between assignments or during the assignment, when the agency worker is not working, to which regulation 7(8) does not apply.

### **Structure of assignments**

**9.—**(1) Notwithstanding paragraphs (1) and (2) of regulation 7, and regulation 8, if paragraphs (3) and (4) apply an agency worker shall be treated as having completed the qualifying period from the time at which the agency worker would have completed the qualifying period but for the structure of the assignment or assignments mentioned in paragraph (3).

(2) Notwithstanding paragraphs (1) and (2) of regulation 7, and regulation 8, if paragraphs (3) and (4) apply an agency worker who has completed the qualifying period and—

- (a) is no longer entitled to the rights conferred by regulation 5, but
- (b) would be so entitled but for the structure of the assignment or assignments mentioned in paragraph (3),

shall be treated as continuing to be entitled to those rights from the time at which the agency worker completed that period.

(3) This paragraph applies when an agency worker has—

- (a) completed two or more assignments with a hirer (H),
- (b) completed at least one assignment with H and one or more earlier assignments with hirers connected to H, or
- (c) worked in more than two roles during an assignment with H, and on at least two occasions has worked in a role that was not the “same role” as the previous role within the meaning of regulation 7(3).

(4) This paragraph applies where—

- (a) the most likely explanation for the structure of the assignment, or assignments, mentioned in paragraph (3) is that H, or the temporary work agency supplying the agency worker to H, or, where applicable, H and one or more hirers connected to H, intended to prevent the agency worker from being entitled to, or from continuing to be entitled to, the rights conferred by regulation 5; and
- (b) the agency worker would be entitled to, or would continue to be entitled to, the rights conferred by regulation 5 in relation to H, but for that structure.



(5) The following matters in particular shall be taken into account in determining whether the structure of the assignment or assignments mentioned in paragraph (3) shows that the most likely explanation for it is that mentioned in paragraph (4)(a)—

- (a) the length of the assignments;
- (b) the number of assignments with H and, where applicable, hirers connected to H;
- (c) the number of times the agency worker has worked in a new role with H and, where applicable, hirers connected to H, and that new role is not the “same role” within the meaning of regulation 7(3);
- (d) the number of times the agency worker has returned to work in the same role within the meaning of regulation 7(3) with H and, where applicable, hirers connected to H;
- (e) the period of any break between assignments with H and, where applicable, hirers connected to H.

(6) For the purposes of this regulation hirers are connected to a hirer if one hirer (directly or indirectly) has control of the other hirer or a third person (directly or indirectly) has control of both hirers.

#### **Permanent contracts providing for pay between assignments**

**10.—**(1) To the extent to which it relates to pay, regulation 5 does not have effect in relation to an agency worker who has a permanent contract of employment with a temporary work agency if—

- (a) the contract of employment was entered into before the beginning of the first assignment under that contract and includes terms and conditions in writing relating to—
  - (i) the minimum scale or rate of remuneration or the method of calculating remuneration,
  - (ii) the location or locations where the agency worker may be expected to work,
  - (iii) the expected hours of work during any assignment,
  - (iv) the maximum number of hours of work that the agency worker may be required to work each week during any assignment,
  - (v) the minimum hours of work per week that may be offered to the agency worker during any assignment provided that it is a minimum of at least one hour, and
  - (vi) the nature of the work that the agency worker may expect to be offered including any relevant requirements relating to qualifications or experience;
- (b) the contract of employment contains a statement that the effect of entering into it is that the employee does not, during the currency of the contract, have any entitlement to the rights conferred by regulation 5 insofar as they relate to pay;
- (c) during any period under the contract after the end of the first assignment under that contract in which the agency worker is not working temporarily for and under the supervision and direction of a hirer but is available to do so—
  - (i) the temporary work agency takes reasonable steps to seek suitable work for the agency worker,
  - (ii) if suitable work is available, the temporary work agency offers the agency worker to be proposed to a hirer who is offering such work, and
  - (iii) the temporary work agency pays the agency worker a minimum amount of remuneration in respect of that period (“the minimum amount”); and
- (d) the temporary work agency does not terminate the contract of employment until it has complied with its obligations in sub-paragraph (c) for an aggregate of not less than four calendar weeks during the contract.

(2) For work to be suitable for the purposes of paragraph (1)(c) the nature of the work, and the terms and conditions applicable to the agency worker whilst performing the work, must not differ from the nature of the work and the terms and conditions included in the contract of employment under paragraph (1)(a).

### **Calculating the minimum amount of pay**

**11.**—(1) Subject to paragraph (3), the minimum amount to be paid to the agency worker during a pay reference period falling within a period to which regulation 10(1)(c) applies shall not be less than 50% of the pay paid to the agency worker in the relevant pay reference period.

(2) For the purposes of paragraph (1), the relevant pay reference period shall be the pay reference period in which the agency worker received the highest level of pay which fell—

- (a) within the 12 weeks immediately preceding the end of the previous assignment, where the assignment lasted for longer than 12 weeks, or
- (b) during the assignment, where the assignment lasted for 12 or fewer weeks.

(3) The minimum amount shall be not less than the amount that the agency worker would have been entitled to for the hours worked in the relevant pay reference period if the provisions of the National Minimum Wage Regulations 1999 applied(**12**).

(4) For the purposes of calculating the minimum amount as set out in paragraph (1), only payments in respect of basic pay whether by way of annual salary, payments for actual time worked or by reference to output or otherwise shall be taken into account.

(5) For the purposes of this regulation, “pay reference period” is a month or, in the case of a worker who is paid wages by reference to a period shorter than a month, that period.

### **Rights of agency workers in relation to access to collective facilities and amenities**

**12.**—(1) An agency worker has during an assignment the right to be treated no less favourably than a comparable worker in relation to the collective facilities and amenities provided by the hirer.

(2) The rights conferred by paragraph (1) apply only if the less favourable treatment is not justified on objective grounds.

(3) “Collective facilities and amenities” includes, in particular—

- (a) canteen or other similar facilities;
- (b) child care facilities; and
- (c) transport services.

(4) For the purposes of paragraph (1) an individual is a comparable worker in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

- (a) both that individual and the agency worker are—
  - (i) working for and under the supervision and direction of the hirer, and
  - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills;
- (b) that individual works or is based at the same establishment as the agency worker or, where there is no comparable worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements; and

(12) S.I. 1999/584; relevant amending instruments are S.I. 2000/1989, S.I. 2001/2673, S.I. 2002/1999, S.I. 2003/1923, S.I. 2004/1930, S.I. 2005/2019, S.I. 2006/2001, S.I. 2007/2318, S.I. 2008/1894, S.I. 2009/1902, S.I. 2010/1901, S.I. 2010/3001

- (c) that individual is an employee of the hirer or, where there is no employee satisfying the requirements of sub-paragraphs (a) and (b), is a worker of the hirer and satisfies those requirements.

### **Rights of agency workers in relation to access to employment**

**13.**—(1) An agency worker has during an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency worker the same opportunity as a comparable worker to find permanent employment with the hirer.

(2) For the purposes of paragraph (1) an individual is a comparable worker in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

- (a) both that individual and the agency worker are—
  - (i) working for and under the supervision and direction of the hirer, and
  - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills;
- (b) that individual works or is based at the same establishment as the agency worker; and
- (c) that individual is an employee of the hirer or, where there is no employee satisfying the requirements of sub-paragraphs (a) and (b), is a worker of the hirer and satisfies those requirements.

(3) For the purposes of paragraph (1), an individual is not a comparable worker if that individual's employment with the hirer has ceased.

(4) For the purposes of paragraph (1) the hirer may inform the agency worker by a general announcement in a suitable place in the hirer's establishment.

## **PART 3**

### **Liability, Protections and Remedies**

#### **Liability of temporary work agency and hirer**

**14.**—(1) Subject to paragraph (3) a temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for the breach.

(2) The hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for the breach.

(3) A temporary work agency shall not be liable for a breach of regulation 5 where it is established that the temporary work agency—

- (a) obtained, or has taken reasonable steps to obtain, relevant information from the hirer —
  - (i) about the basic working and employment conditions in force in the hirer;
  - (ii) if needed to assess compliance with regulation 5, about the relevant terms and conditions under which an employee of the hirer is working where—
    - (aa) that employee is considered to be a comparable employee in relation to that agency worker for the purposes of regulation 5(4), and
    - (bb) those terms and conditions are ordinarily included in the contract of such a comparable employee; and
  - (iii) which explains the basis on which it is considered that the employee referred to in sub-paragraph (ii)(aa) is a comparable employee;

- (b) where it has received such information, has acted reasonably in determining what the agency worker's basic working and employment conditions should be at the end of the qualifying period and during the period after that until, in accordance with regulation 8, the agency worker ceases to be entitled to the rights conferred by regulation 5; and
- (c) ensured that where it has responsibility for applying those basic working and employment conditions to the agency worker, that the agency worker has been treated in accordance with the determination described in sub-paragraph (b),

and to the extent that the temporary work agency is not liable under this provision, the hirer shall be liable.

(4) Where more than one temporary work agency is a party to the proceedings, when deciding whether or not each temporary work agency is responsible in full or in part the industrial tribunal shall have regard to the extent to which each agency was responsible for the determination, or application, of any of the agency worker's basic working and employment conditions.

(5) The hirer shall be liable for any breach of regulation 12 or 13.

(6) In relation to the rights conferred by regulation 17—

- (a) a temporary work agency shall be liable for any act, or any deliberate failure to act, of that temporary work agency; and
- (b) the hirer shall be liable for any act, or any deliberate failure to act, of the hirer.

### **Restrictions on contracting out**

**15.** Article 245(13) of the 1996 Order (restrictions on contracting out) shall apply in relation to these Regulations as if they were contained in that Order.

### **Right to receive information**

**16.—(1)** An agency worker who considers that the hirer or a temporary work agency may have treated that agency worker in a manner which infringes a right conferred by regulation 5, may make a written request to the temporary work agency for a written statement containing information relating to the treatment in question.

(2) A temporary work agency that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—

- (a) relevant information relating to the basic working and employment conditions of the workers of the hirer,
- (b) the factors the temporary work agency considered when determining the basic working and employment conditions which applied to the agency worker at the time when the breach of regulation 5 is alleged to have taken place, and
- (c) where the temporary work agency seeks to rely on regulation 5(3), relevant information which—
  - (i) explains the basis on which it is considered that an individual is a comparable employee, and
  - (ii) describes the relevant terms and conditions, which apply to that employee.

(3) If an agency worker has made a request under paragraph (1) and has not been provided with such a statement within 30 days of making that request, the agency worker may make a written request to the hirer for a written statement containing information relating to the relevant basic working and employment conditions of the workers of the hirer.

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(13) Article 245 of the Order was amended by Article 10(1) of, and Schedule 1, paragraph 15 to, the Employment Rights (Dispute Resolution) (Northern Ireland) Order 1998, S.I. 1998/1265 (N.I. 8)

(4) A hirer that receives a request made in accordance with paragraph (3) shall, within 28 days of receiving it, provide the agency worker with such a statement.

(5) An agency worker who considers that the hirer may have treated that agency worker in a manner which infringes a right conferred by regulation 12 or 13, may make a written request to the hirer for a written statement containing information relating to the treatment in question.

(6) A hirer that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—

- (a) all relevant information relating to the rights of a comparable worker in relation to the rights mentioned in regulation 12 or, as the case may be, regulation 13, and
- (b) the particulars of the reasons for the treatment of the agency worker in respect of the right conferred by regulation 12 or, as the case may be, regulation 13.

(7) Paragraphs (1) and (3) apply only to an agency worker who at the time that worker makes such a request is entitled to the right conferred by regulation 5.

(8) Information provided under this regulation, whether in the form of a written statement or otherwise, is admissible as evidence in any proceedings under these Regulations.

(9) If it appears to the tribunal in any proceedings under these Regulations—

- (a) that a temporary work agency or the hirer (as the case may be) deliberately, and without reasonable excuse, failed to provide information, whether in the form of a written statement or otherwise, or
- (b) that any written statement supplied is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that that temporary work agency or hirer (as the case may be) has infringed the right in question.

### **Unfair dismissal and the right not to be subjected to detriment**

**17.—**(1) An agency worker who is an employee and is dismissed shall be regarded as unfairly dismissed for the purposes of Part XI of the 1996 Order if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—

- (a) that the agency worker—
  - (i) brought proceedings under these Regulations;
  - (ii) gave evidence or information in connection with such proceedings brought by any agency worker;
  - (iii) made a request under regulation 16 for a written statement;
  - (iv) otherwise did anything under these Regulations in relation to a temporary work agency, hirer, or any other person;
  - (v) alleged that a temporary work agency or hirer has breached these Regulations;
  - (vi) refused (or proposed to refuse) to forgo a right conferred by these Regulations; or
- (b) that the hirer or a temporary work agency believes or suspects that the agency worker has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) Where the reason or principal reason for subjection to any act or deliberate failure to act is that mentioned in paragraph (3)(a)(v), or paragraph 3(b) so far as it relates to paragraph (3)(a)(v),

neither paragraph (1) nor paragraph (2) applies if the allegation made by the agency worker is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to a dismissal of an employee within the meaning of Part XI of the 1996 Order.

### **Complaints to industrial tribunals etc**

**18.**—(1) In this regulation “respondent” includes the hirer and any temporary work agency.

(2) Subject to regulation 17(5) an agency worker may present a complaint to an industrial tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5, 12, 13, or 17(2).

(3) An agency worker may present a complaint to an industrial tribunal that the temporary work agency has—

- (a) breached a term of the contract of employment described in regulation 10(1)(a); or
- (b) breached a duty under regulation 10(1)(b), (c) or (d).

(4) Subject to paragraph (5), an industrial tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

- (a) in the case of an alleged infringement of a right conferred by regulation 5, 12, or 17(2) or a breach of a term of the contract described in regulation 10(1)(a) or of a duty under regulation 10(1)(b), (c) or (d), with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them;
- (b) in the case of an alleged infringement of the right conferred by regulation 13, with the date, or if more than one the last date, on which other individuals, whether or not employed by the hirer, were informed of the vacancy.

(5) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(6) For the purposes of calculating the date of the infringement, detriment or breach under paragraph (4)(a)—

- (a) where a term in a contract infringes a right conferred by regulation 5, 12, or 17(2), or breaches regulation 10(1), that infringement or breach shall be treated, subject to subparagraph (b), as taking place on each day of the period during which the term infringes that right or breaches that duty;
- (b) a deliberate failure to act that is contrary to regulation 5, 12 or 17(2) or 10(1) shall be treated as done when it was decided on.

(7) In the absence of evidence establishing the contrary, a person (P) shall be taken for the purposes of paragraph (6)(b) to decide not to act—

- (a) when P does an act inconsistent with doing the failed act; or
- (b) if P has done no such inconsistent act, when the period expires within which P might reasonably have been expected to have done the failed act if it was to be done.

(8) Where an industrial tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—

- (a) making a declaration as to the rights of the complainant in relation to the matters to which the complaint relates;
- (b) ordering the respondent to pay compensation to the complainant;
- (c) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating

or reducing the adverse effect on the complainant of any matter to which the complaint relates.

(9) Where a tribunal orders compensation under paragraph (8)(b), and there is more than one respondent, the amount of compensation payable by each or any respondent shall be such as may be found by the tribunal to be just and equitable having regard to the extent of each respondent's responsibility for the infringement to which the complaint relates.

(10) Subject to paragraphs (12) and (13), where a tribunal orders compensation under paragraph (8)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

- (a) the infringement or breach to which the complaint relates; and
- (b) any loss which is attributable to the infringement.

(11) The loss shall be taken to include—

- (a) any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and
- (b) loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach.

(12) Subject to paragraph (13), where a tribunal orders compensation under paragraph (8)(b), any compensation which relates to an infringement or breach of the rights—

- (a) conferred by regulation 5 or 10; or
- (b) conferred by regulation 17(2) to the extent that the infringement or breach relates to regulation 5 or 10,

shall not be less than two weeks' pay, calculated in accordance with regulation 19.

(13) Paragraph (12) does not apply where the tribunal considers that in all the circumstances of the case, taking into account the conduct of the claimant and respondent, two weeks' pay is not a just and equitable amount of compensation, and the amount shall be reduced as the tribunal consider appropriate.

(14) Where a tribunal finds that regulation 9(4) applies and orders compensation under paragraph (8)(b), the tribunal may make an additional award of compensation under paragraph (8)(b), which shall not be more than £5,000, and where there is more than one respondent the proportion of any additional compensation awarded that is payable by each of them shall be such as the tribunal considers just and equitable having regard to the extent to which it considers each to have been responsible for the fact that regulation 9(4)(a) applies.

(15) Compensation in respect of treating an agency worker in a manner which infringes the right conferred by regulation 5, 12 or 13 or breaches regulation 10(1)(b), (c) or (d), or breaches a term of the contract described in regulation 10(1)(a), shall not include compensation for injury to feelings.

(16) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate loss as applies to damages recoverable under the common law of Northern Ireland.

(17) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(18) If a temporary work agency or the hirer fails, without reasonable justification, to comply with a recommendation made by an industrial tribunal under paragraph (8)(c) the tribunal may, if it thinks it just and equitable to do so—

- (a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under paragraph (8)(b); or
- (b) make an order under paragraph (8)(b).

**Calculating a week's pay**

**19.**—(1) For the purposes of regulation 18(12)—

- (a) a week's pay shall be the higher of—
  - (i) the average weekly pay received by the agency worker, in relation to the assignment to which the claim relates, in the relevant period; and
  - (ii) the average weekly pay the agency worker should have been receiving by virtue of regulation 5, in relation to the assignment to which the claim relates, in the relevant period; and
- (b) for the purposes of this paragraph, only payments in respect of basic pay whether by way of annual salary, payments for actual time worked or by reference to output or otherwise shall be taken into account.

(2) The relevant period is —

- (a) where the assignment has ended on or before the date the complaint was presented to the tribunal under regulation 18(2), the four week period (or in a case where the assignment was shorter than four weeks, that period) ending with the last day of the assignment to which the claim relates; or
- (b) where the assignment has not so ended the four week period (or in the case where that assignment was shorter than four weeks, that period) ending with the date of the complaint.

**Liability of employers and principals**

**20.**—(1) Anything done by a person in the course of employment shall be treated for the purposes of these Regulations as also done by their employer, whether or not it was done with that employer's knowledge or approval.

(2) Anything done by a person as agent for the employer with the authority of the employer shall be treated for the purposes of these Regulations as also done by the employer.

(3) In proceedings under these Regulations against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that they took such steps as were reasonably practicable to prevent the employee from—

- (a) doing that act; or
- (b) doing, in the course of their employment, acts of that description.

**PART 4****Special Classes of Person****Crown employment and service as a member of the armed forces**

**21.**—(1) These Regulations have effect in relation to—

- (a) Crown employment,
- (b) service as a member of the armed forces of the Crown,
- (c) persons in Crown employment, and
- (d) persons in service as a member of the armed forces of the Crown,

as they have effect in relation to other employment and other employees.



(2) In paragraph (1) “Crown employment” means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision but subject to paragraph (4).

(3) For the purposes of the application of the provisions of these Regulations in relation to Crown employment and service as a member of the armed forces of the Crown in accordance with paragraph (1)—

- (a) references to an employee shall be construed as references to a person in Crown employment or in service as a member of the armed forces of the Crown to whom the definition of employee is appropriate; and
- (b) references to a contract in relation to an employee shall be construed as references to the terms of employment of a person in Crown employment or in service as a member of the armed forces of the Crown to whom the definition of employee is appropriate.

(4) Crown employment—

- (a) does not include service as a member of the armed forces of the Crown, but
- (b) does include employment by an association established for the purposes of Part X1 of the Reserve Forces Act 1996(14).

#### **Police Service of Northern Ireland and Police Service of Northern Ireland Reserve**

**22.**—(1) For the purposes of these Regulations, the holding, otherwise than under a contract of employment, of the office of constable or an appointment as a police cadet shall be treated as employment, under a contract of employment, by the relevant officer.

(2) For the purposes of these Regulations, any constable or other person who has been seconded to SOCA to serve as a member of its staff shall be treated as employed by SOCA, in respect of actions taken by, or on behalf of, SOCA.

(3) For the purposes of regulation 20—

- (a) the secondment of any constable or other person to SOCA to serve as a member of its staff shall be treated as employment by SOCA (and not as being employment by any other person); and
- (b) anything done by a person so seconded in the performance, or purported performance, of that person’s functions shall be treated as done in the course of that employment.

(4) In this regulation “the relevant officer” means—

- (a) in relation to a member of the police service or police cadet appointed for a police area, the chief constable of police; and
- (b) in relation to any other person holding the office of constable or an appointment as a police cadet, the person who has the direction and control of the body of constables in question.

(5) In this regulation “SOCA” means the Serious Organised Crime Agency.

## PART 5

### Amendments to Legislation

#### **Amendments to legislation**

**23.**—(1) In relation to Northern Ireland, any reference to the Agency Workers Regulations 2010(15) within the statutory provisions listed in Schedule 1 shall be construed as a reference to the Agency Workers Regulations (Northern Ireland) 2011.

(2) Schedule 2 which contains amendments to legislation shall have effect.

Sealed with the Official Seal of the Department for Employment and Learning on 5th October 2011.



*Dr. Stephen Farry*  
Minister for Employment and Learning

## SCHEDULE 1

Regulation 23

### CONSTRUCTION OF UK WIDE STATUTORY PROVISIONS

1. The statutory provisions to which regulation 23(1) refers are—
  - (a) the Transnational Information and Consultation of Employees Regulations 1999<sup>(16)</sup>,
  - (b) the European Cooperative Society (Involvement of Employees) Regulations 2006<sup>(17)</sup>, and
  - (c) the Companies (Cross-Border Mergers) Regulations 2007<sup>(18)</sup>.

## SCHEDULE 2

Regulation 23

### CONSEQUENTIAL AMENDMENTS

## PART 1

### PRIMARY LEGISLATION

#### **The Industrial Relations (Northern Ireland) Order 1992**

1. The Industrial Relations (Northern Ireland) Order 1992<sup>(19)</sup> is amended as follows.
2. In Article 2(2) (Interpretation), before the entry relating to “agent” insert—

““agency worker” has the meaning given in regulation 3 of the Agency Workers Regulations (Northern Ireland) 2011;”.
3. In Article 39(1) (general duty of employers to disclose information) after “undertaking” insert “(including information relating to use of agency workers in that undertaking)”.

#### **The Trade Union and Labour Relations (Northern Ireland) Order 1995**

4. The Trade Union and Labour Relations (Northern Ireland) Order 1995<sup>(20)</sup> is amended as follows.
5. In Article 2(2) (Interpretation), after the entry relating to “the Agency” insert—

““agency worker” has the meaning given in regulation 3 of the Agency Workers Regulations (Northern Ireland) 2011;”.
6. In Article 44B (collective bargaining: training)—
  - (a) after paragraph (4) insert—

“(4A) If the information mentioned in paragraph (4) includes information relating to the employment situation the employer must (so far as not required by paragraph (4)) also provide at the same time to the trade union the following information—

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<sup>(16)</sup> S.I. 1999/3323, amended by S.I. 2010/1088

<sup>(17)</sup> S.I. 2006/2059

<sup>(18)</sup> S.I. 2007/2974

<sup>(19)</sup> S.I. 1992/807 (N.I.5)

<sup>(20)</sup> S.I. 1995/1980 (N.I.12); Article 44B was inserted by Article 7(1) of the Employment Relations (Northern Ireland) Order 1999, S.I. 1999/2790 (N.I. 9); Schedule 1A was inserted by the Employment Relations (Northern Ireland) Order 1999, Article 3(1) and (3) and Schedule 1

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- (a) the number of agency workers working temporarily for and under the supervision and direction of the employer,
  - (b) the parts of the employer’s undertaking in which those agency workers are working, and
  - (c) the type of work those agency workers are carrying out.”, and
- (b) in paragraph (5) after “(4)” insert “or (4A)”.

7.—(1) Schedule 1A is amended as follows.

(2) In paragraph 7, after sub-paragraph (5), insert—

“(5A) Sub-paragraph (5B) applies to an agency worker whose contract within regulation 3(1)(b) of the Agency Workers Regulations (Northern Ireland) 2011 (contract with the temporary work agency) is not a contract of employment.

(5B) For the purposes of sub-paragraphs (1) and (2), the agency worker is to be treated as having a contract of employment with the temporary work agency for the duration of the assignment with the employer (and “assignment” has the same meaning as in those Regulations).”.

(3) In paragraph 99, after sub-paragraph (5), insert—

“(5A) Sub-paragraph (5B) applies to an agency worker whose contract within regulation 3(1)(b) of the Agency Workers Regulations (Northern Ireland) 2011 (contract with the temporary work agency) is not a contract of employment.

(5B) For the purposes of sub-paragraphs (1) and (4), the agency worker is to be treated as having a contract of employment with the temporary work agency for the duration of the assignment with the employer (and “assignment” has the same meaning as in those Regulations).”.

### **The Employment Rights (Northern Ireland) Order 1996**

8. The 1996 Order is amended as follows.

9. In Article 59(1) (supplementary: meaning of “wages” etc), after sub-paragraph (f) insert—

“(fa) remuneration on ending the supply of an agency worker on maternity grounds under Article 100C,”

10. After Article 85 insert—

*“Ante-natal care: agency workers*

#### **Right to time off for ante-natal care (agency workers)**

85ZA.—(1) An agency worker who—

- (a) is pregnant, and
- (b) has, on the advice of a registered medical practitioner, registered midwife or registered health visitor, made an appointment to attend at any place for the purpose of receiving ante-natal care,

is entitled to be permitted, by the temporary work agency and the hirer, to take time off during the agency worker’s working hours in order to enable her to keep the appointment.

(2) An agency worker is not entitled to be permitted by either of those persons to take time off under this Article to keep an appointment unless, if that person requests her to do so, she produces for that person’s inspection—

- (a) a certificate from a registered medical practitioner, registered midwife or registered health visitor stating that the agency worker is pregnant, and
- (b) an appointment card or some other document showing that the appointment has been made.

(3) Paragraph (2) does not apply where the agency worker's appointment is the first appointment during her pregnancy for which she seeks permission to take time off in accordance with paragraph (1).

(4) For the purposes of this Article the working hours of an agency worker shall be taken to be any time when, in accordance with the terms under which the agency worker works temporarily for and under the supervision and direction of the hirer, the agency worker is required to be at work.

(5) In this Article references to a registered health visitor have the same meaning as in Article 83(1)(b).

### **Right to remuneration for time off under Article 85ZA**

85ZB.—(1) An agency worker who is permitted to take time off under Article 85ZA is entitled to be paid remuneration by the temporary work agency for the period of absence at the appropriate hourly rate.

(2) The appropriate hourly rate, in relation to an agency worker, is the amount of one week's pay divided by the number of normal working hours in a week for that agency worker in accordance with the terms under which the agency worker works temporarily for and under the supervision and direction of the hirer that are in force on the day when the time off is taken.

(3) But where the number of normal working hours during the assignment differs from week to week or over a longer period, the amount of one week's pay shall be divided instead by the average number of normal working hours calculated by dividing by twelve the total number of the agency worker'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.

(4) A right to any amount under paragraph (1) does not affect any right of an agency worker in relation to remuneration under her contract with the temporary work agency ("contractual remuneration").

(5) Any contractual remuneration paid to an agency worker in respect of a period of time off under Article 85ZA goes towards discharging any liability of the temporary work agency 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 temporary work agency to pay contractual remuneration in respect of that period.

### **Complaints to industrial tribunals: agency workers**

85ZC.—(1) An agency worker may present a complaint to an industrial tribunal that the temporary work agency—

- (a) has unreasonably refused to permit her to take time off as required by Article 85ZA, or
- (b) has failed to pay the whole or any part of any amount to which she is entitled under Article 85ZB.

(2) An agency worker may present a complaint to an industrial tribunal that the hirer has unreasonably refused to permit her to take time off as required by Article 85ZA.

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(3) An industrial tribunal shall not consider a complaint under paragraph (1) or (2) unless it is presented—

- (a) before the end of the period of three months beginning with the date of the appointment concerned, 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.

(4) Where an industrial tribunal finds a complaint under this Article well-founded, the tribunal shall make a declaration to that effect.

(5) If the complaint is that the temporary work agency or hirer has unreasonably refused to permit the agency worker to take time off, the tribunal shall also order payment to the agency worker of an amount equal to the remuneration to which she would have been entitled under Article 85ZB if she had not been refused the time off.

(6) Where the tribunal orders payment under paragraph (5), the amount payable by each party shall be such as may be found by the tribunal to be just and equitable having regard to the extent of each respondent's responsibility for the infringement to which the complaint relates.

(7) If the complaint is that the temporary work agency has failed to pay the agency worker the whole or part of any amount to which she is entitled under Article 85ZB, the tribunal shall also order the temporary work agency to pay to the agency worker the amount which it finds due to her.

#### **Agency workers: supplementary**

85ZD.—(1) Without prejudice to any other duties of the hirer or temporary work agency under any statutory provision or rule of law Articles 85ZA to 85ZC do not apply where the agency worker—

- (a) has not completed the qualifying period, or
- (b) is no longer entitled to the rights conferred by regulation 5 of the Agency Workers Regulations (Northern Ireland) 2011 pursuant to regulation 8(a) or (b) of those Regulations.

(2) Nothing in those Articles imposes a duty on the hirer or temporary work agency beyond the original intended duration, or likely duration of the assignment, whichever is the longer.

(3) Those Articles do not apply where Articles 85 to 87 apply.

(4) In this Article and Articles 85ZA to 85ZC the following have the same meaning as in the Agency Workers Regulations (Northern Ireland) 2011—

- “agency worker”;
- “assignment”;
- “hirer”;
- “qualifying period”;
- “temporary work agency”.

11. After Article 100 insert—

*“Ending the supply of an agency worker on maternity grounds*

**Meaning of ending the supply of an agency worker on maternity grounds**

100A.—(1) For the purposes of this Part the supply of an agency worker to a hirer is ended on maternity grounds if, in consequence of action taken pursuant to a provision listed in paragraph (2), the supply of the agency worker to the hirer is ended on the grounds that she is pregnant, has recently given birth or is breastfeeding a child.

(2) The provisions are—

- (a) regulation 8(3) or 9(2) of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997,
- (b) regulation 16A(2) or 17A of the Management of Health and Safety at Work Regulations (Northern Ireland) 2000, or
- (c) regulation 20 of the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005.

**Right to offer of alternative work**

100B.—(1) Where the supply of an agency worker to a hirer is ended on maternity grounds and the temporary work agency has available suitable alternative work, the agency worker has a right to be offered to be proposed for such alternative work.

(2) For alternative work to be suitable for an agency worker for the purposes of this Article—

- (a) the work must be of a kind which is both suitable in relation to her and appropriate for her to do in the circumstances, and
- (b) the terms and conditions applicable to her whilst performing the work, if they differ from the corresponding terms and conditions which would have applied to her but for the fact that the supply of the agency worker to the hirer was ended on maternity grounds, must not be substantially less favourable to her than those corresponding terms and conditions.

(3) Paragraph (1) does not apply—

- (a) where the agency worker has confirmed in writing that she no longer requires the work-finding services of the temporary work agency, or
- (b) beyond the original intended duration, or likely duration, whichever is the longer, of the assignment which ended when the supply of the agency worker to the hirer was ended on maternity grounds.

**Right to remuneration**

100C.—(1) Where the supply of an agency worker to a hirer is ended on maternity grounds, that agency worker is entitled to be paid remuneration by the temporary work agency.

(2) An agency worker is not entitled to remuneration under this Article in respect of any period if—

- (a) the temporary work agency has—
  - (i) offered to propose the agency worker to a hirer that has alternative work available which is suitable alternative work for her for the purposes of Article 100B, or

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- (ii) proposed the agency worker to a hirer that has such suitable alternative work available, and that hirer has agreed to the supply of that agency worker; and
  - (b) the agency worker has unreasonably refused that offer or to perform that work.
- (3) Nothing in this Article imposes a duty on the temporary work agency to pay remuneration beyond the original intended duration, or likely duration, whichever is the longer, of the assignment which ended when the supply of the agency worker to the hirer was ended on maternity grounds.

**Agency workers: supplementary**

100D.—(1) Without prejudice to any other duties of the hirer or temporary work agency under any statutory provision or rule of law Articles 100A, 100B and 100C do not apply where the agency worker—

- (a) has not completed the qualifying period, or
- (b) is no longer entitled to the rights conferred by regulation 5 of the Agency Workers Regulations (Northern Ireland) 2011 pursuant to regulation 8(a) or (b) of those Regulations.

(2) Nothing in those Articles imposes a duty on the hirer or temporary work agency beyond the original intended duration, or likely duration of the assignment, whichever is the longer.

(3) Those Articles do not apply where Articles 98 to 100 apply.

(4) In this Article and Articles 100A to 100C the following have the same meaning as in the Agency Workers Regulations (Northern Ireland) 2011—

- “agency worker”;
- “assignment”;
- “hirer”;
- “qualifying period”;
- “temporary work agency”.

12. After Article 101 insert—

**“Calculation of remuneration (agency workers)**

101A.—(1) The amount of remuneration payable by a temporary work agency to an agency worker under Article 100C is a week’s pay in respect of each week for which remuneration is payable in accordance with Article 100C; and if in any week remuneration is payable in respect of only part of that week the amount of a week’s pay shall be reduced proportionately.

(2) A right to remuneration under Article 100C does not affect any right of the agency worker in relation to remuneration under the contract with the temporary work agency (“contractual remuneration”).

(3) Any contractual remuneration paid by the temporary work agency to an agency worker in respect of any period goes towards discharging the temporary work agency’s liability under Article 100C in respect of that period; and, conversely, any payment of remuneration in discharge of a temporary work agency’s liability under Article 100C in respect of any period goes towards discharging any obligation of the temporary work agency to pay contractual remuneration in respect of that period.



(4) For the purposes of paragraph (1), a week's pay is the weekly amount that would have been payable to the agency worker for performing the work, according to the terms of the contract with the temporary work agency, but for the fact that the supply of the agency worker to the hirer was ended on maternity grounds.

(5) Expressions used in this Article and Articles 100A to 100C have the same meaning as in those Articles (see Article 100D).”.

13. After Article 102 insert—

**“Complaints to industrial tribunals: agency workers**

102A.—(1) An agency worker may present a complaint to an industrial tribunal that the temporary work agency has failed to pay the whole or any part of remuneration to which the agency worker is entitled under Article 100C.

(2) An industrial tribunal shall not consider a complaint under paragraph (1) relating to remuneration in respect of any day unless it is presented—

- (a) before the end of the period of three months beginning with the day on which the supply of the agency worker to a hirer was ended on maternity grounds, 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 within that period of three months.

(3) Where an industrial tribunal finds a complaint under paragraph (1) well-founded, the tribunal shall order the temporary work agency to pay the agency worker the amount of remuneration which it finds is due to her.

(4) An agency worker may present a complaint to an industrial tribunal that in contravention of Article 100B the temporary work agency has failed to offer to propose the agency worker to a hirer that has suitable alternative work available.

(5) An industrial tribunal shall not consider a complaint under paragraph (4) unless it is presented—

- (a) before the end of the period of three months beginning with the day on which the supply of the agency worker to a hirer was ended on maternity grounds, 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 within that period of three months.

(6) Where an industrial tribunal finds a complaint under paragraph (4) well-founded, the tribunal shall order the temporary work agency to pay the agency worker the amount of compensation which it finds is due to her.

(7) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

- (a) the infringement of the agency worker's right under Article 100B by the failure on the part of the temporary work agency to which the complaint relates, and
- (b) any loss sustained by the agency worker which is attributable to that failure.

(8) Expressions used in this Article and Articles 100A to 100C have the same meaning as in those Articles (see Article 100D).”.

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14. In Article 137(**21**) (redundancy as unfair dismissal) in paragraph (1)(c) (which requires one of a specified group of paragraphs to apply for a person to be treated as unfairly dismissed) for “(7K)” substitute “(7L)” and after paragraph “(7K)” insert—

“(7L) This paragraph 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) of regulation 17 of the Agency Workers Regulations (Northern Ireland) 2011 (unless the case is one to which paragraph (4) of that regulation applies).”.

15. In Article 140(**22**) (exclusion of right: qualifying period of employment) in paragraph (3) (cases where no qualifying period of employment is required) omit “or” at the end of sub-paragraph (q) and after sub-paragraph (r) insert—

“or

(s) paragraph (1) of regulation 17 of the Agency Workers Regulations (Northern Ireland) 2011 applies.”

16.—(1) Article 216 (duty of employer to consult representatives of employees) is amended as follows.

(2) In paragraph (6) (disclosure for the purposes of consultation), after sub-paragraph (f) add—

“(g) the number of agency workers working temporarily for and under the supervision and direction of the employer,

(h) the parts of the employer’s undertaking in which those agency workers are working, and

(i) the type of work those agency workers are carrying out.”.

(3) After paragraph (12) insert —

“(13) In this Article “agency worker” has the same meaning as in regulation 3 of the Agency Workers Regulations (Northern Ireland) 2011.”

### **The Industrial Tribunals (Northern Ireland) Order 1996**

17. The Industrial Tribunals (Northern Ireland) Order 1996(**23**) is amended as follows.

18. In Article 20(1)(**24**) (conciliation)—

(a) omit “or” immediately preceding the sub-paragraph inserted by regulation 33 of the European Public Limited-Liability Company (Employee Involvement) (Northern Ireland) Regulations 2009(**25**), and

(b) after sub-paragraph (s), insert—

“, or

(t) arising out of a contravention, or alleged contravention of regulation 5, 12, 13 or 17(2) of the Agency Workers Regulations (Northern Ireland) 2011.”

(21) Article 137 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

(22) Article 140(3) has been amended on a number of occasions to specify additional cases where the qualifying period does not apply

(23) [S.I. 1996/1921 \(N.I.18\)](#)

(24) Article 20(1) has been amended on a number of occasions to specify additional cases under which industrial tribunal proceedings may be brought

(25) [S.I. 2009/2402](#)

## PART 2

### OTHER LEGISLATION

#### **Management of Health and Safety at Work Regulations (Northern Ireland) 2000**

19. The Management of Health and Safety at Work Regulations (Northern Ireland) 2000<sup>(26)</sup> are amended as follows.

20. After regulation 16 insert—

**“Alteration of working conditions in respect of new or expectant mothers (agency workers)**

16A.—(1) Where, in the case of an individual agency worker, the taking of any other action the hirer is required to take under the relevant statutory provisions would not avoid the risk referred to in regulation 16(1) the hirer shall, if it is reasonable to do so, and would avoid such risks, alter her working conditions or hours of work.

(2) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the hirer shall without delay inform the temporary work agency, who shall then end the supply of that agency worker to the hirer.

(3) In paragraphs (1) and (2) references to risk, in relation to risk from any infectious or contagious disease, are references to a level of risk at work which is in addition to the level to which a new or expectant mother may be expected to be exposed outside the workplace.

21. After regulation 17 insert—

**“Certificate from registered medical practitioner in respect of new or expectant mothers (agency workers)**

17A. Where—

- (a) a new or expectant mother works at night; and
- (b) a certificate from a registered medical practitioner or a registered midwife shows that it is necessary for her health or safety that she should not be at work for any period of such work identified in the certificate,

the hirer shall without delay inform the temporary work agency, who shall then end the supply of that agency worker to the hirer.”.

22. After regulation 18 insert—

**“Notification by new or expectant mothers (agency workers)**

18A.—(1) Nothing in regulation 16A(1) or (2) shall require the hirer to take any action in relation to an agency worker until she has notified the hirer in writing that she is pregnant, has given birth within the previous six months, or is breastfeeding.

(2) Nothing in regulation 16A(2) shall require the temporary work agency to end the supply of the agency worker until she has notified the temporary work agency in writing that she is pregnant, has given birth within the previous six months, or is breastfeeding.

(3) Nothing in regulation 16A(1) shall require the hirer to maintain action taken in relation to an agency worker—

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(26) S.R. 2000 No. 388

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- (a) in a case—
  - (i) to which regulation 16A(1) relates; and
  - (ii) where the agency worker has notified the hirer, that she is pregnant, where she has failed, within a reasonable time of being requested to do so in writing by the hirer, to produce for the hirer’s inspection a certificate from a registered medical practitioner or a registered midwife showing that she is pregnant; or
- (b) once the hirer knows that she is no longer a new or expectant mother; or
- (c) if the hirer cannot establish whether she remains a new or expectant mother.

#### **Agency workers: general provisions**

18B.—(1) Without prejudice to any other duties of the hirer or temporary work agency under any enactment or rule of law in relation to health and safety at work, regulation 16A, 17A and 18A shall not apply where the agency worker—

- (a) has not completed the qualifying period; or
- (b) is no longer entitled to the rights conferred by regulation 5 of the Agency Workers Regulations (Northern Ireland) 2011 pursuant to regulation 8(a) or (b) of those Regulations.

(2) Nothing in regulation 16A or 17A imposes a duty on the hirer or temporary work agency beyond the original intended duration, or likely duration of the assignment, whichever is the longer.

(3) This regulation, and regulations 16A, 17A and 18A do not apply in circumstances where regulations 16, 17 and 18 apply.

(4) For the purposes of this regulation and regulation 16A, 17A or 18A the following have the same meaning as in the Agency Workers Regulations (Northern Ireland) 2011—

- “agency worker”;
- “assignment”;
- “hirer”;
- “qualifying period”;
- “temporary work agency”.

23. In regulation 20(1)(a) for “regulations 16 to 18”, substitute, “regulations 16 to 18B”.

#### **The Information and Consultation of Employees Regulations (Northern Ireland) 2005**

24. The Information and Consultation of Employees Regulations (Northern Ireland) 2005(27) are amended as follows.

25. In regulation 2(2) (interpretation) after the definition of—

- (a) “the 1996 Order” insert—
  - ““agency worker” has the same meaning as in regulation 3 of the Agency Workers Regulations (Northern Ireland) 2011;”;
- (b) “standard information and consultation provisions” insert—
  - ““suitable information relating to the use of agency workers” means information as to—

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(27) S.R. 2005 No. 47

- (a) the number of agency workers working temporarily for and under the supervision and direction of the employer,
- (b) the parts of the employer's undertaking in which those agency workers are working, and
- (c) the type of work those agency workers are carrying out.”.

26. After regulation 3 insert—

**“Agency Workers**

3A.—(1) Paragraphs (2) and (3) apply to an agency worker whose contract within regulation 3(1)(b) of the Agency Workers Regulations (Northern Ireland) 2011 (contract with the temporary work agency) is not a contract of employment.

(2) For the purposes of regulations 3, 4 and Schedule 1, any agency worker who has a contract with a temporary work agency shall be treated as being employed by that temporary work agency for the duration of that agency worker's assignment with the employer.

(3) In these Regulations “assignment” has the same meaning as in regulation 2 and “temporary work agency” has the same meaning as in regulation 4, of the Agency Workers Regulations (Northern Ireland) 2011.”.

27. After regulation 8 insert—

**“Pre-existing agreements: agency workers**

8A. Where information about the employment situation is to be provided under a pre-existing agreement by an employer, such information must include suitable information relating to the use of agency workers (if any) in that undertaking.”.

28. In regulation 16(1), omit the “and” at the end of sub-paragraph (e) and after sub-paragraph (f) add—

“and

- (g) provide that where an employer is to provide information about the employment situation, under that agreement or under any part, such information shall include suitable information relating to the use of agency workers (if any) in that undertaking.”.

29. In regulation 20(1)(b), after “the situation, structure and probable development of employment within the undertaking” and before “and on any anticipatory measures envisaged” insert “(and such information must include suitable information relating to the use of agency workers (if any) in that undertaking)”.

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

30. The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006(28) are amended as follows.

31. In regulation 13, after paragraph (2) insert—

“(2A) Where information is to be supplied under paragraph (2) by an employer—

- (a) this must include suitable information relating to the use of agency workers (if any) by that employer; and

- (b) “suitable information relating to the use of agency workers” means—
  - (i) the number of agency workers working temporarily for and under the supervision and direction of the employer;
  - (ii) the parts of the employer’s undertaking in which those agency workers are working; and
  - (iii) the type of work those agency workers are carrying out.”.

### **The European Public Limited-Liability Company (Employee Involvement) (Northern Ireland) Regulations 2009**

32. The European Public Limited-Liability Company (Employee Involvement) (Northern Ireland) Regulations 2009(29) are amended as follows.

33. In regulation 3 (interpretation) after the definition in paragraph (1) of—

- (a) “the Agency” insert—
  - ““agency worker” has the same meaning as in regulation 3 of the Agency Workers Regulations (Northern Ireland) 2011;” and
- (b) “standard rules on employee involvement” insert—
  - ““suitable information relating to the use of agency workers” means—
    - (a) the number of agency workers working temporarily for and under the supervision and direction of the undertaking;
    - (b) the parts of the undertaking in which those agency workers are working; and
    - (c) the type of work those agency workers are carrying out.”.

34. In regulation 5(2)—

- (a) omit the “and” at the end of sub-paragraph (b); and
- (b) after sub-paragraph (c) insert—
  - “(d) the number of agency workers working temporarily for and under the supervision and direction of the undertaking,
  - (e) the parts of the undertaking in which those agency workers are working, and
  - (f) the type of work those agency workers are carrying out.”.

35. After regulation 15(3) insert—

“(3A) Where under the employee involvement agreement the competent organ of the SE is to provide information on the employment situation in that company, such information must include suitable information relating to the use of agency workers (if any) in that company.”.

36. After regulation 19(3) insert—

“(3A) This paragraph applies to an agency worker whose contract within regulation 3(1) (b) of the Agency Workers Regulations (Northern Ireland) 2011 (contract with the temporary work agency) is not a contract of employment—

- (a) for the purposes of paragraph (3)(a) and (b), any agency worker who has a contract with a temporary work agency, which was at the relevant time a participating company, is to be treated as having been employed by that temporary work agency for the duration of their assignment with a hirer, and

- (b) in this paragraph “assignment” and “hirer” have the same meaning as in regulation 2, and “temporary work agency” has the same meaning as in regulation 4, of the Agency Workers Regulations (Northern Ireland) 2011.”.

37. In the Schedule, Part 2, after paragraph 8 insert—

“8A. Where under the provisions of this Part, the competent organ of the SE is to provide information on the employment situation in that company, such information must include suitable information relating to the use of agency workers (if any) in that company.”.

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations, which are made under section 2(2) of the European Communities Act 1972 (c.68), and Articles 17(1), (2) and (5), 55(2) of, and paragraphs 6, 7 and 14(1) of Schedule 3 to the Health and Safety at Work (Northern Ireland) Order 1978, implement in Northern Ireland Council Directive 2008/104/EC of 19th November 2008 on temporary agency work (OJ L 327, 5.12.2008, p.9). This Directive establishes a general framework for protection of temporary agency workers. The Regulations provide certain rights for temporary agency workers including in relation to basic working and employment conditions.

Regulations 2 to 4 provide definitions, including those of ‘agency worker’ and ‘temporary work agency’.

Regulation 5 provides a right for the agency worker to the same basic working and employment conditions as the agency worker would have been entitled to if they had been recruited directly by the hirer.

Regulation 6 specifies that it is terms and conditions in the hirer relating to pay, the duration of working time, night work, rest periods, rest breaks and annual leave that are relevant.

Regulation 7 makes provision for a qualifying period, and sets out the conditions which need to be met to qualify for the right provided for by regulation 5.

Regulation 8 sets out the consequences that arise when an agency worker has completed the qualifying period.

Regulation 9 sets out the circumstances in which an agency worker is to be treated as having completed the qualifying period and, where applicable, is to be treated as continuing to be entitled to those rights.

Regulation 10 disapplies regulation 5, insofar as it relates to pay, where a permanent contract of employment is entered into between a temporary work agency and the agency worker. It provides a number of conditions that must be fulfilled in relation to the form and terms of the permanent contract and for a minimum amount of pay to be paid to the agency worker between assignments.

Regulation 11 sets out how that minimum amount of pay is to be calculated.

Regulations 12 and 13 give rights to agency workers in relation to access to collective facilities and amenities provided by the hirer, and access to employment with the hirer.

Regulation 14 deals with issues of liability. Agency workers are involved in a triangular relationship involving the temporary work agency and hirer. This regulation provides that the

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temporary work agency and hirer can both be liable to the extent that they are responsible for a breach of regulation 5, and sets out the circumstances in which a temporary work agency is not responsible for a breach of that regulation. Regulation 14 also provides that the hirer is liable for breaches of regulations 12 and 13.

Regulation 15 makes provision in relation to restrictions on contracting out.

Regulation 16 provides a right for the agency worker to receive information from the temporary work agency, or hirer as applicable, in relation to the rights and duties conferred by regulations 5, 12 and 13.

Regulation 17 makes provision in relation to the right not to be unfairly dismissed or subjected to a detriment for a reason relating to these Regulations.

Regulation 18 provides remedies for individuals, including compensation, by way of proceedings in industrial tribunals. Regulation 18 includes provision for a minimum award of two weeks' pay and for an additional award of up to £5,000 where regulation 9 applies.

Regulation 19 provides information for the agency worker on calculating a week's pay.

Regulation 20 deals with the liability of employers and principals.

Regulations 21 to 22 contain provisions which make the regulations applicable to Crown employment, the armed services and the police service.

Regulation 23 construes references to the Agency Workers Regulations 2010 in the legislation listed in Schedule 1 as references to the Agency Workers Regulations (Northern Ireland) 2011 insofar as the case relates to Northern Ireland.

Schedule 1 lists the Regulations with U.K. application referred to in regulation 23.

Schedule 2 contains consequential amendments to primary and secondary legislation (including in relation to disclosure of information about agency workers, collective bargaining and health and safety matters).