

SCHEDULE 5

Regulation 51

Duty to consider working beyond retirement

Interpretation

1.—(1) In this Schedule—

“dismissal” means a dismissal within the meaning of Article 127 of the 1996 Order⁽¹⁾;

“employee” means a person to whom regulation 32 (exception for retirement) applies and references to “employer” shall be construed accordingly;

“intended retirement date” has the meaning given by sub-paragraph (2);

“operative date of termination” means (subject to paragraph 10(3))—

(a) where the employer terminates the employee’s contract of employment by notice, the date on which the notice expires; or

(b) where the employer terminates the contract of employment without notice, the date on which the termination takes effect;

“request” means a request made under paragraph 5; and

“worker” has the same meaning as in Article 3(3) of the 1996 Order.

(2) In this Schedule, “intended retirement date” means—

(a) where the employer notifies a date in accordance with paragraph 2, that date;

(b) where the employer notifies a date in accordance with paragraph 4 and either no request is made or a request is made after the notification, that date;

(c) where,

(i) the employer has not notified a date in accordance with paragraph 2,

(ii) a request is made before the employer has notified a date in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given),

(iii) the request is made by an employee who has reasonable grounds for believing that the employer intends to retire him on a certain date,

(iv) the request identifies that date, and

the date so identified;

(d) in a case to which paragraph 3 has applied, any earlier or later date that has superseded the date mentioned in head (a), (b) or (c) as the intended date of retirement by virtue of paragraph 3(3);

(e) in a case to which paragraph 10 has applied, the later date that has superseded the date mentioned in head (a), (b) or (c) as the intended date of retirement by virtue of paragraph 10(3)(b).

Duty of employer to notify employee

2.—(1) An employer who intends to retire an employee has a duty to notify the employee in writing of—

(a) the employee’s right to make a request; and

(1) S.I.1996/1919 (N.I. 16); Article 127 was amended by Schedule 9 to the Employment Relations (Northern Ireland) Order 1999 (S.I. 1999/2790 (N.I. 9)) and regulation 11 of, and paragraph 2(7) of Schedule 2 to, S.R. 2002 No. 298

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(b) the date on which he intends the employee to retire, not more than one year and not less than six months before that date.

(2) The duty to notify applies regardless of—

- (a) whether there is any term in the employee’s contract of employment indicating when his retirement is expected to take place;
- (b) any other notification of, or information about, the employee’s date of retirement given to him by the employer at any time; and
- (c) any other information about the employee’s right to make a request given to him by the employer at any time.

3.—(1) This paragraph applies if the employer has notified the employee in accordance with paragraph 2 or 4 or the employee has made a request before being notified in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given), and—

- (a) the employer and employee agree, in accordance with paragraph 7(3)(b) or 8(5)(b), that the dismissal is to take effect on a date later than the relevant date;
- (b) the employer gives notice to the employee, in accordance with paragraph 7(7)(a)(ii) or, where the employee appeals, paragraph 8(9)(a)(ii), that the dismissal is to take effect on a date later than the relevant date; or
- (c) the employer and employee agree that the dismissal is to take effect on a date earlier than the relevant date.

(2) This Schedule does not require the employer to give the employee a further notification in respect of dismissal taking effect on a date—

- (a) agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) that is later than the relevant date and falls six months or less after the relevant date; or
- (b) agreed as mentioned in sub-paragraph (1)(c) that is earlier than the relevant date.

(3) If—

- (a) a date later than the relevant date is agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) and falls six months or less after the relevant date, or
- (b) a date earlier than the relevant date is agreed as mentioned in sub-paragraph (1)(c),

the earlier or later date shall supersede the relevant date as the intended date of retirement.

(4) In this paragraph, “the relevant date” means the date that is defined as the intended date of retirement in head (a), (b) or (c) of paragraph 1(2).

Continuing duty to notify employee

4. Where the employer has failed to comply with paragraph 2, he has a continuing duty to notify the employee in writing as described in paragraph 2(1) until the fourteenth day before the operative date of termination.

Statutory right to request not to retire

5.—(1) An employee may make a request to his employer not to retire on the intended date of retirement.

(2) In his request the employee must propose that his employment should continue, following the intended date of retirement—

- (a) indefinitely;
- (b) for a stated period; or

(c) until a stated date,
and, if the request is made at a time when it is no longer possible for the employer to notify in accordance with paragraph 2 and the employer has not yet notified in accordance with paragraph 4, must identify the date on which he believes that the employer intends to retire him.

(3) A request must be in writing and state that it is made under this paragraph.

(4) An employee may only make one request under this paragraph in relation to any one intended date of retirement and may not make a request in relation to a date that supersedes a different date as the intended date of retirement by virtue of paragraph 3(3) or 10(3)(b).

(5) A request is only a request made under this paragraph if it is made—

- (a) in a case where the employer has complied with paragraph 2, more than three months but not more than six months before the intended date of retirement; or
- (b) in a case where the employer has not complied with paragraph 2, before, but not more than six months before, the intended date of retirement .

An employer's duty to consider a request

6. An employer to whom a request is made is under a duty to consider the request in accordance with paragraphs 7 to 9.

Meeting to consider request

7.—(1) An employer having a duty under paragraph 6 to consider a request shall hold a meeting to discuss the request with the employee within a reasonable period after receiving it.

(2) The employer and employee must take all reasonable steps to attend the meeting.

(3) The duty to hold a meeting does not apply if, before the end of the period that is reasonable—

- (a) the employer and employee agree that the employee's employment will continue indefinitely and the employer gives notice to the employee to that effect; or
- (b) the employer and employee agree that the employee's employment will continue for an agreed period and the employer gives notice to the employee of the length of that period or of the date on which it will end.

(4) The duty to hold a meeting does not apply if—

- (a) it is not practicable to hold a meeting within the period that is reasonable; and
- (b) the employer complies with sub-paragraph (5).

(5) Where sub-paragraph (4)(a) applies, the employer may consider the request without holding a meeting provided he considers any representations made by the employee.

(6) The employer shall give the employee notice of his decision on the request as soon as is reasonably practicable after the date of the meeting or, if sub-paragraphs (4) and (5) apply, his consideration of the request.

(7) A notice given under sub-paragraph (6) shall—

(a) where the decision is to accept the request, state that it is accepted and—

- (i) where the decision is that the employee's employment will continue indefinitely, state that fact; or
- (ii) where the decision is that the employee's employment will continue for a further period, state that fact and specify the length of the period or the date on which it will end;

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(b) where the decision is to refuse the request, confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect, and, in the case of a notice falling within head (b), and of a notice referred to in head (a) that specifies a period shorter than the period proposed by the employee in the request, shall inform the employee of his right to appeal.

(8) All notices given under this paragraph shall be in writing and be dated.

Appeals

8.—(1) An employee is entitled to appeal against—

- (a) a decision of his employer to refuse the request; or
- (b) a decision of his employer to accept the request where the notice given under paragraph 7(6) states as mentioned in paragraph 7(7)(a)(ii) specifies and a period shorter than the period proposed by the employee in the request,

by giving notice in accordance with sub-paragraph (2) as soon as is reasonably practicable after the date of the notice given under paragraph 7(6).

(2) A notice of appeal under sub-paragraph (1) shall set out the grounds of appeal.

(3) The employer shall hold a meeting with the employee to discuss an appeal within a reasonable period after the date of the notice of appeal.

(4) The employer and employee must take all reasonable steps to attend the meeting.

(5) The duty to hold a meeting does not apply if, before the end of the period that is reasonable—

- (a) the employer and employee agree that the employee's employment will continue indefinitely and the employer gives notice to the employee to that effect; or
- (b) the employer and employee agree that the employee's employment will continue for an agreed period and the employer gives notice to the employee of the length of that period or of the date on which it will end.

(6) The duty to hold a meeting does not apply if—

- (a) it is not practicable to hold a meeting within the period that is reasonable; and
- (b) the employer complies with sub-paragraph (7).

(7) Where sub-paragraph (6)(a) applies, the employer may consider the appeal without holding a meeting provided he considers any representations made by the employee.

(8) The employer shall give the employee notice of his decision on the appeal as soon as is reasonably practicable after the date of the meeting or, if sub-paragraphs (6) and (7) apply, his consideration of the appeal.

(9) A notice given under sub-paragraph (8) shall—

- (a) where the decision is to accept the appeal, state that it is accepted and—
 - (i) where the decision is that the employee's employment will continue indefinitely, state that fact; or
 - (ii) where the decision is that the employee's employment will continue for a further period, state that fact and specify the length of the period or the date on which it will end;
- (b) where the decision is to refuse the appeal, confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect.

(10) All notices given under this paragraph shall be in writing and be dated.

Right to be accompanied

- 9.—(1) This paragraph applies where—
- (a) a meeting is held under paragraph 7 or 8; and
 - (b) the employee reasonably requests to be accompanied at the meeting.
- (2) Where this paragraph applies, the employer must permit the employee to be accompanied at the meeting by one companion who—
- (a) is chosen by the employee;
 - (b) is a worker employed by the same employer as the employee;
 - (c) is to be permitted to address the meeting (but not to answer questions on behalf of the employee); and
 - (d) is to be permitted to confer with the employee during the meeting.
- (3) If—
- (a) an employee has a right under this paragraph to be accompanied at a meeting;
 - (b) his chosen companion will not be available at the time proposed for the meeting by the employer; and
 - (c) the employee proposes an alternative time which satisfies sub-paragraph (4),
- the employer must postpone the meeting to the time proposed by the employee.
- (4) An alternative time must—
- (a) be convenient for employer, employee and companion; and
 - (b) fall before the end of the period of seven days beginning with the first day after the day proposed by the employer.
- (5) An employer shall permit a worker to take time off during working hours for the purpose of accompanying an employee in accordance with a request under sub-paragraph (1)(b).
- (6) Articles 92(3) and (4), 93 and 95 of the 1996 Order (time off for carrying out trade union duties) shall apply in relation to sub-paragraph (5) as they apply in relation to Article 92(1) of that Order.

Dismissal before request considered

- 10.—(1) This paragraph applies where—
- (a) by virtue of paragraph 6 an employer is under a duty to consider a request;
 - (b) the employer dismisses the employee;
 - (c) that dismissal is the contemplated dismissal to which the request relates; and
 - (d) the operative date of termination would, but for sub-paragraph (3), fall on or before the day on which the employer gives notice in accordance with paragraph 7(6).
- (2) Subject to paragraph (4), the contract of employment shall continue in force for all purposes, including the purpose of determining for any purpose the period for which the employee has been continuously employed, until the day following that on which the notice under paragraph 7(6) is given.
- (3) The day following the day on which that notice is given shall supersede—
- (a) the date mentioned in sub-paragraph (1)(d) as the operative date of termination; and
 - (b) the date defined as the intended date of retirement in head (a), (b) or (c) of paragraph 1(2) as the intended date of retirement.

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(4) Any continuation of the contract of employment under sub-paragraph (2) shall be disregarded when determining the operative date of termination for the purposes of Articles 130ZA to 130ZH of the 1996 Order(2).

Complaint to industrial tribunal: failure to comply with paragraph 2

11.—(1) An employee may present a complaint to an industrial tribunal that his employer has failed to comply with the duty to notify him in paragraph 2.

(2) A tribunal shall not consider a complaint under this paragraph unless the complaint is presented—

- (a) before the end of the period of three months beginning with—
 - (i) the last day permitted to the employer by paragraph 2 for complying with the duty to notify; or
 - (ii) if the employee did not then know the date that would be the intended date of retirement, the day on which he knew or should have known that date; 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 that a complaint under this paragraph is well-founded, it shall order the employer to pay compensation to the employee of such amount, not exceeding 8 weeks' pay, as the tribunal considers just and equitable in all the circumstances.

(4) Chapter IV of Part I of the 1996 Order (a week's pay) shall apply for the purposes of sub-paragraph (3); and in applying that Chapter the calculation date shall be taken to be the date on which the complaint was presented or, if earlier, the operative date of termination.

(5) The limit in Article 23(1) of the 1996 Order(3) (maximum amount of a week's pay) shall apply for the purposes of sub-paragraph (3).

Complaint to industrial tribunal: denial of right to be accompanied

12.—(1) An employee may present a complaint to an industrial tribunal that his employer has failed, or threatened to fail, to comply with paragraph 9(2) or (3).

(2) A tribunal shall not consider a complaint under this paragraph in relation to a failure or threat unless the complaint is presented—

- (a) before the end of the period of three months beginning with the date of the failure or threat; 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 that a complaint under this paragraph is well-founded it shall order the employer to pay compensation to the worker of an amount not exceeding two weeks' pay.

(4) Chapter IV of Part I of the 1996 Order (a week's pay) shall apply for the purposes of sub-paragraph (3); and in applying that Chapter the calculation date shall be taken to be the date on which the relevant meeting took place (or was to have taken place).

(2) Articles 130ZA to 130ZH are inserted by regulation 53 of, and paragraph 3(4) of Schedule 7 to, these Regulations
(3) Article 23(1) was amended by paragraph 4 of Schedule 2 to the Employment (Northern Ireland) Order 2002 (S.I. 2002/2836 (N.I. 2)) and paragraph 2(2) of Schedule 5 to the Employment (Northern Ireland) Order 2003 (S.I. 2003/2902 (N.I. 15)). The amount laid down in Article 23(1) may be increased or decreased by order made by the Department for Employment and Learning under Article 33 of the Employment Relations (Northern Ireland) Order 1999 (S.I. 1999/2790 (N.I. 9)): see S.R. 2006 No. 75

(5) The limit in Article 23(1) of the 1996 Order (maximum amount of a week's pay) shall apply for the purposes of sub-paragraph (3).

Detriment and dismissal

13.—(1) An employee has the right not to be subjected to any detriment by any act by his employer done on the ground that he exercised or sought to exercise his right to be accompanied in accordance with paragraph 9.

(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he accompanied or sought to accompany an employee pursuant to a request under paragraph 9.

(3) Article 71 of the 1996 Order⁽⁴⁾ (complaints to industrial tribunals) shall apply in relation to contraventions of sub-paragraph (1) or (2) as it applies in relation to contraventions of certain Articles of that Order.

(4) Sub-paragraph (2) does not apply where the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part XI of the 1996 Order).

(5) An employee who is dismissed shall be regarded for the purposes of Part XI of the 1996 Order as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—

- (a) exercised or sought to exercise his right to be accompanied in accordance with paragraph 9; or
- (b) accompanied or sought to accompany an employee pursuant to a request under that paragraph.

(6) Articles 163 to 167 of the 1996 Order (interim relief) shall apply in relation to dismissal for the reason specified in sub-paragraph (5)(a) or (b) as they apply in relation to dismissal for a reason specified in Article 163(1)(b) of that Order.

(4) Article 71 was amended by regulation 31(2) of [S.R. 1998 No. 386](#); paragraph 3 of the Schedule to the Employment Rights (Time off for Study or Training) (Northern Ireland) Order 1998 (S.I. [1998/1761 \(N.I. 15\)](#)); Article 6 of the Public Interest Disclosure (Northern Ireland) Order 1998 (S.I. [1998/1763 \(N.I. 17\)](#)); paragraph 4 of Schedule 4 to the Employment Relations (Northern Ireland) Order 1999 (S.I. [1999/2790 \(N.I. 9\)](#)); paragraph 4(8) of Schedule 2 to the Employment (Northern Ireland) Order 2002 (S.I. [2002/2836 \(N.I. 2\)](#)); paragraph 2(3) of Schedule 1 to the Tax Credit Act 2002 (c. 21); paragraph 2(3) of Schedule 5 to the Employment (Northern Ireland) Order 2003 (S.I. [2003/2902 \(N.I. 15\)](#)) and paragraph 20(2) of Schedule 1 to the Employment Relations (Northern Ireland) Order 2004 (S.I. [2004/3078 \(N.I. 19\)](#))