

SCHEDULES

SCHEDULE 5

Section 28.

EMPLOYMENT PROTECTION IN HEALTH AND SAFETY CASES

1 After section 22 of the 1978 Act there shall be inserted—

“Right not to suffer detriment in health and safety cases

22A Right not to suffer detriment in health and safety cases.

- (1) An employee 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—
- (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, he carried out, or proposed to carry out, any such activities,
 - (b) being a representative of workers on matters of health and safety at work, or a member of a safety committee—
 - (i) in accordance with arrangements established under or by virtue of any enactment, or
 - (ii) by reason of being acknowledged as such by the employer, he performed, or proposed to perform, any functions as such a representative or a member of such a committee,
 - (c) being an employee at a place where—
 - (i) there was no such representative or safety committee, or
 - (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,he brought to his employer’s attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
 - (d) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left, or proposed to leave, or (while the danger persisted) refused to return to, his place of work or any dangerous part of his place of work, or
 - (e) in circumstances of danger which he reasonably believed to be serious and imminent, he took, or proposed to take, appropriate steps to protect himself or other persons from the danger.
- (2) For the purposes of subsection (1)(e) whether steps which an employee took, or proposed to take, were appropriate shall be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

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- (3) An employee shall not be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was, or would have been, so negligent for the employee to take the steps which he took, or proposed to take, that a reasonable employer might have treated him as the employer did.
- (4) Except where an employee is dismissed in circumstances in which, by virtue of section 142, section 54 does not apply to the dismissal, this section shall not apply where the detriment in question amounts to dismissal.

22B Proceedings for contravention of section 22A.

- (1) An employee may present a complaint to an industrial tribunal on the ground that he has been subjected to a detriment in contravention of section 22A.
- (2) On such a complaint it shall be for the employer to show the ground on which any act, or deliberate failure to act, was done.
- (3) An industrial tribunal shall not consider a complaint under this section unless it is presented—
 - (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
 - (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.
- (4) For the purposes of subsection (3)—
 - (a) where an act extends over a period, the “date of the act” means the last day of that period, and
 - (b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

22C Remedies.

- (1) Where the industrial tribunal finds that a complaint under section 22B is well-founded, it shall make a declaration to that effect and may make an award of compensation to be paid to the complainant in respect of the act or failure to act complained of.
- (2) The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss which is attributable to the act or failure which infringed his right.
- (3) The loss shall be taken to include—

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- (a) any expenses reasonably incurred by the complainant in consequence of the act or failure complained of, and
 - (b) loss of any benefit which he might reasonably be expected to have had but for that act or failure.
- (4) In ascertaining the loss, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or Scotland.
- (5) Where the tribunal finds that the act or failure complained of 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.”.
- 2 In subsection (3) of section 57 of that Act (general provisions as to fairness of dismissal), for the words “sections 59 to 61” there shall be substituted the words “sections 57A to 61”.
- 3 After that section there shall be inserted—

“57A Dismissal in health and safety cases.

- (1) The dismissal of an employee by an employer shall be regarded for the purposes of this Part as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
- (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, carried out, or proposed to carry out, any such activities,
 - (b) being a representative of workers on matters of health and safety at work, or a member of a safety committee—
 - (i) in accordance with arrangements established under or by virtue of any enactment, or
 - (ii) by reason of being acknowledged as such by the employer, performed, or proposed to perform, any functions as such a representative or a member of such a committee,
 - (c) being an employee at a place where—
 - (i) there was no such representative or safety committee, or
 - (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,brought to his employer’s attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
 - (d) in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, left, or proposed to leave, or (while the danger persisted) refused to return to, his place of work or any dangerous part of his place of work, or
 - (e) in circumstances of danger which he reasonably believed to be serious and imminent, took, or proposed to take, appropriate steps to protect himself or other persons from the danger.

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(2) For the purposes of subsection (1)(e) whether steps which an employee took, or proposed to take, were appropriate shall be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee was that specified in subsection (1)(e), the dismissal shall not be regarded as having been unfair if the employer shows that it was, or would have been, so negligent for the employee to take the steps which he took, or proposed to take, that a reasonable employer might have dismissed him for taking, or proposing to take, them.”.

4 In section 59 of the 1978 Act (dismissal on ground of redundancy), in subsection (2) (inserted by section 24(2) of this Act), between the words “section” and “60” there shall be inserted the words “57A(1) (read with (2) and (3))”.

5 In section 64 of the 1978 Act (qualifying period etc for right not to be unfairly dismissed), in subsection (4) (inserted by section 24(3) of this Act), between the words “section” and “60” there shall be inserted the words “57A(1) (read with (2) and (3))”.

6 In section 71 of the 1978 Act (compensation for failure to comply with section 69)

- (a) in subsection (2)(b) (additional award), after the word “unless” there shall be inserted the words “the case is one where this paragraph is excluded or”; and
- (b) after that subsection there shall be inserted—

“(2A) Subsection (2)(b) is excluded where the reason (or, if more than one, the principal reason) for the dismissal or, in a redundancy case, for selecting the employee for dismissal, was an inadmissible reason.

(2B) For the purposes of subsection (2A) a reason is “inadmissible” if it is one of those specified in section 57A(1)(a) and (b).”.

7 In section 72 of the 1978 Act (compensation for unfair dismissal) there shall be inserted at the end the following—

“(2) Where the reason (or, if more than one, the principal reason) for the dismissal or, in a redundancy case, for selecting the employee for dismissal, was an inadmissible reason, then, unless—

- (a) the complainant does not request the tribunal to make an order under section 69, or
- (b) the case falls within section 73(2),

the award shall include a special award calculated in accordance with section 75A.

(3) For the purposes of subsection (2) a reason is “inadmissible” if it is one of those specified in section 57A(1)(a) and (b).”and the preceding words shall become subsection (1) of section 72.

8 In section 73 of the 1978 Act (calculation of basic award)—

- (a) in subsection (1), for “(6)” there shall be substituted “(6A)”;
- (b) after subsection (6) there shall be inserted—

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- “(6A) Where the reason (or, if more than one, the principal reason) for the dismissal or, in a redundancy case, for selecting the employee for dismissal, was an inadmissible reason the amount of the basic award (before any reduction under the following provisions of this section) shall not be less than £2,700.
- (6B) For the purposes of this section a reason is “inadmissible” if it is one of those specified in section 57A(1)(a) and (b).
- (6C) The Secretary of State may by order increase the sum specified in subsection (6A).
- (6D) No order shall be made under subsection (6C) unless a draft of the order has been laid before Parliament and approved by a resolution of each House of Parliament.”; and
- (c) in subsection (7C), for the words following “apply” there shall be substituted the words “in a redundancy case unless the reason for selecting the employee for dismissal was an inadmissible reason; and, in that event, subsection (7B) shall apply only to so much of the basic award as is payable because of subsection (6A)”.

9 After section 75 of that Act there shall be inserted—

“75A Calculation of special award.

- (1) Subject to the following provisions of this section, the amount of the special award shall be—
- (a) one week’s pay multiplied by 104, or
 - (b) £13,400,
- whichever is the greater, but shall not exceed £26,800.
- (2) Where the award of compensation is made under section 71(2)(a) then, unless the employer satisfies the tribunal that it was not practicable to comply with the preceding order under section 69, the amount of the special award shall be increased to—
- (a) one week’s pay multiplied by 156, or
 - (b) £20,100,
- whichever is the greater, but subject to the following provisions of this section.
- (3) In a case where the amount of the basic award is reduced under section 73(5), the amount of the special award shall be reduced by the same fraction.
- (4) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the special award to any extent, the tribunal shall reduce or further reduce that amount accordingly.
- (5) Where the tribunal finds that the complainant has unreasonably—
- (a) prevented an order under section 69 from being complied with, or
 - (b) refused an offer by the employer (made otherwise than in compliance with such an order) which if accepted would have

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the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed,

the tribunal shall reduce or further reduce the amount of the special award to such extent as it considers just and equitable having regard to that finding.

- (6) Where the employer has engaged a permanent replacement for the complainant, the tribunal shall not take that fact into account in determining for the purposes of subsection (2) whether it was practicable to comply with an order under section 69 unless the employer shows that it was not practicable for him to arrange for the complainant's work to be done without engaging a permanent replacement.
- (7) The Secretary of State may by order increase any of the sums specified in subsections (1) and (2).
- (8) No order shall be made under subsection (7) unless a draft of the order has been laid before Parliament and approved by a resolution of each House of Parliament.”.

10 After section 76 of that Act there shall be inserted—

“Interim relief

77 Interim relief pending determination of complaint of unfair dismissal.

- (1) An employee who presents a complaint to an industrial tribunal that he has been unfairly dismissed by his employer and that the reason (or, if more than one, the principal reason) for the dismissal was one of those specified in section 57A(1)(a) and (b) may apply to the tribunal for interim relief.
- (2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).
- (3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.
- (4) The tribunal shall give to the employer (not later than seven days before the date of the hearing) a copy of the application together with notice of the date, time and place of the hearing.
- (5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

77A Procedure on hearing of application and making of order.

- (1) If on hearing an employee's application for interim relief it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find that the reason (or, if more than one, the principal reason) for his dismissal was one of those specified in section 57A(1)(a) and (b) the following provisions shall apply.

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- (2) The tribunal shall announce its findings and explain to both parties (if present) what powers the tribunal may exercise on the application and in what circumstances it will exercise them, and shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—
 - (a) to reinstate the employee, that is to say, to treat him in all respects as if he had not been dismissed, or
 - (b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.
- (3) For this purpose “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.
- (4) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.
- (5) If the employer states that he is willing to re-engage the employee in another job and specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions; and—
 - (a) if the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect, and
 - (b) if he is not, then, if the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, but otherwise the tribunal shall make no order.
- (6) If on the hearing of an application for interim relief the employer fails to attend before the tribunal, or states that he is unwilling either to reinstate the employee or re-engage him as mentioned in subsection (2), the tribunal shall make an order for the continuation of the employee’s contract of employment.

78 Orders for continuation of contract of employment.

- (1) An order under section 77A for the continuation of a contract of employment is an order that the contract of employment continue in force—
 - (a) for the purposes of pay or of any other benefit derived from the employment, seniority, pension rights and other similar matters, and
 - (b) for the purposes of determining for any purpose the period for which the employee has been continuously employed,from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.
- (2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.

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- (3) Subject as follows, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—
 - (a) in the case of payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and
 - (b) in the case of a payment for any past period, within such time as may be specified in the order.
- (4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.
- (5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, shall go towards discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period shall go towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.
- (6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.
- (7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.

78A Application for variation or revocation of order.

- (1) At any time between the making of an order under section 77A and the determination or settlement of the complaint, the employer or the employee may apply to an industrial tribunal for the revocation or variation of the order on the ground of a relevant change of circumstances since the making of the order.
- (2) Sections 77 and 77A apply in relation to such an application as in relation to an original application for interim relief except that, in the case of an application by the employer, section 77(4) has effect with the substitution of a reference to the employee for the reference to the employer.

79 Consequence of failure to comply with order.

- (1) If on the application of an employee an industrial tribunal is satisfied that the employer has not complied with the terms of an order for the reinstatement or re-engagement of the employee under section 77A(4) or (5), the tribunal shall—
 - (a) make an order for the continuation of the employee's contract of employment, and

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- (b) order the employer to pay the employee such compensation as the tribunal considers just and equitable in all the circumstances having regard—
 - (i) to the infringement of the employee’s right to be reinstated or re-engaged in pursuance of the order, and
 - (ii) to any loss suffered by the employee in consequence of the non-compliance.
- (2) Section 78 applies to an order under subsection (1)(a) as in relation to an order under section 77A.
- (3) If on the application of an employee an industrial tribunal is satisfied that the employer has not complied with the terms of an order for the continuation of a contract of employment, the following provisions apply.
- (4) If the non-compliance consists of a failure to pay an amount by way of pay specified in the order, the tribunal shall determine the amount owed by the employer on the date of the determination.
- (5) If on that date the tribunal also determines the employee’s complaint that he has been unfairly dismissed, it shall specify that amount separately from any other sum awarded to the employee.
- (6) In any other case, the tribunal shall order the employer to pay the employee such compensation as the tribunal considers just and equitable in all the circumstances having regard to any loss suffered by the employee in consequence of the non-compliance.”.