
STATUTORY INSTRUMENTS

2002 No. 2788

The Paternity and Adoption Leave Regulations 2002

PART 4

**PROVISIONS APPLICABLE IN RELATION TO
BOTH PATERNITY AND ADOPTION LEAVE**

Protection from detriment

28.—(1) An employee is entitled under section 47C of the 1996 Act⁽¹⁾ not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer because—

- (a) the employee took or sought to take paternity leave or ordinary or additional adoption leave;
- (b) the employer believed that the employee was likely to take ordinary or additional adoption leave, or
- (c) the employee failed to return after a period of additional adoption leave in a case where—
 - (i) the employer did not notify him, in accordance with regulation 17(7) and (8) or otherwise, of the date on which that period ended, and he reasonably believed that the period had not ended, or
 - (ii) the employer gave him less than 28 days' notice of the date on which the period would end, and it was not reasonably practicable for him to return on that date.

(2) Paragraph (1) does not apply where the detriment in question amounts to dismissal within the meaning of Part 10 of the 1996 Act.

Unfair dismissal

29.—(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purpose of Part 10 of that Act as unfairly dismissed if—

- (a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or
- (b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 23 has not been complied with.

(2) An employee who is dismissed shall also be regarded for the purposes of Part 10 of the 1996 Act as unfairly dismissed if—

- (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;
- (b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who had positions similar to that held by the employee and who have not been dismissed by the employer, and

(1) 1996 c. 18; section 47C was inserted by paragraph 8 of Part 3 of Schedule 4 to the Employment Relations Act 1999 and amended by paragraph 26 of Schedule 7 to the Employment Act 2002.

- (c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).
- (3) The kinds of reason referred to in paragraph (1) and (2) are reasons connected with the fact that—
- (a) the employee took, or sought to take, paternity or adoption leave;
 - (b) the employer believed that the employee was likely to take ordinary or additional adoption leave, or
 - (c) the employee failed to return after a period of additional adoption leave in a case where—
 - (i) the employer did not notify him, in accordance with regulation 17(7) and (8) or otherwise, of the date on which that period would end, and he reasonably believed that the period had not ended, or
 - (ii) the employer gave him less than 28 days' notice of the date on which the period would end, and it was not reasonably practicable for him to return on that date.
- (4) Paragraph (1) does not apply in relation to an employee who took adoption leave if—
- (a) immediately before the end of his additional adoption leave period (or, if it ends by reason of dismissal, immediately before the dismissal) the number of employees employed by his employer, added to the number employed by any associated employer of his employer, did not exceed five, and
 - (b) it is not reasonably practicable for the employer (who may be the same employer or a successor of his) to permit the employee to return to a job which is both suitable for the employee and appropriate for him to do in the circumstances or for an associated employer to offer the employee a job of that kind.
- (5) Paragraph (1) does not apply in relation to an employee if—
- (a) it is not reasonably practicable for a reason other than redundancy for the employer (who may be the same employer or a successor of his) to permit the employee to return to a job which is both suitable for the employee and appropriate for him to do in the circumstances;
 - (b) an associated employer offers the employee a job of that kind, and
 - (c) the employee accepts or unreasonably refuses that offer.
- (6) Where, on a complaint of unfair dismissal, any question arises as to whether the operation of paragraph (1) is excluded by the provisions of paragraph (4) or (5), it is for the employer to show that the provisions in question were satisfied in relation to the complainant.

Contractual rights to paternity or adoption leave

- 30.**—(1) This regulation applies where an employee is entitled to—
- (a) paternity leave,
 - (b) ordinary adoption leave, or
 - (c) additional adoption leave,
- (referred to in paragraph (2) as a “statutory right”) and also to a right which corresponds to that right and which arises under the employee’s contract of employment or otherwise.
- (2) In a case where this regulation applies—
- (a) the employee may not exercise the statutory right and the corresponding right separately but may, in taking the leave for which the two rights provide, take advantage of whichever right is, in any particular respect, the more favourable, and
 - (b) the provisions of the 1996 Act and of these Regulations relating to the statutory right apply, subject to any modifications necessary to give effect to any more favourable contractual

terms, to the exercise of the composite right described in sub-paragraph (a) as they apply to the exercise of the statutory right.

Calculation of a week's pay

31. Where—

- (a) under Chapter 2 of Part 14 of the 1996 Act, the amount of a week's pay of an employee falls to be calculated by reference to the average rate of remuneration, or the average amount of remuneration, payable to the employee in respect of a period of twelve weeks ending on a particular date (referred to as "the calculation date");
- (b) during a week in that period, the employee was absent from work on paternity leave or ordinary or additional adoption leave, and
- (c) remuneration is payable to the employee in respect of that week under his contract of employment, but the amount payable is less than the amount that would be payable if he were working,

that week shall be disregarded for the purpose of the calculation and account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.