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STATUTORY INSTRUMENTS

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**2004 No. 2326**

The European Public Limited-  
Liability Company Regulations 2004

PART 3

EMPLOYEE INVOLVEMENT

CHAPTER 8

*PROTECTION FOR MEMBERS OF SPECIAL NEGOTIATING BODY, ETC.*

**Right to time off for members of special negotiating body, etc.**

**39.**—(1) An employee who is—

- (a) a member of a special negotiating body;
- (b) a member of a representative body;
- (c) an information and consultation representative;
- (d) an employee member on a supervisory or administrative organ; or
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or a representative,

is entitled to be permitted by his employer to take reasonable time off during the employee's working hours in order to perform his functions as such a member, representative or candidate.

(2) For the purpose of this regulation the working hours of an employee shall be taken to be any time when, in accordance with his contract of employment, the employee is required to be at work.

**Right to remuneration for time off under regulation 39**

**40.**—(1) An employee who is permitted to take time off under regulation 39 is entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.

(2) Chapter II of Part XIV of the 1996 Act (a week's pay) shall apply in relation to this regulation as it applies in relation to section 62 of the 1996 Act.

(3) The appropriate hourly rate, in relation to an employee, is the amount of one week's pay divided by the number of normal working hours in a week for that employee when employed under the contract of employment in force on the day when the time is taken.

(4) But where the number of normal working hours differs from week to week or over a longer period, the amount of one week's pay shall be divided instead by—

- (a) the average number of normal working hours calculated by dividing by twelve the total number of the employee's normal working hours during the period of twelve weeks ending with the last complete week before the day on which the time off is taken; or

- (b) where the employee has not been employed for a sufficient period to enable the calculation to be made under sub-paragraph (a), a number which fairly represents the number of normal working hours in a week having regard to such of the considerations specified in paragraph (5) as are appropriate in the circumstances.
- (5) The considerations referred to in paragraph (4)(b) are—
  - (a) the average number of normal working hours in a week which the employee could expect in accordance with the terms of his contract; and
  - (b) the average number of normal working hours of other employees engaged in relevant comparable employment with the same employer.
- (6) A right to any amount under paragraph (1) does not affect any right of an employee in relation to remuneration under his contract of employment.
- (7) Any contractual remuneration paid to an employee in respect of a period of time off under regulation 39 goes towards discharging any liability of the employer 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 employer to pay contractual remuneration in respect of that period.

#### **Right to time off: complaints to tribunals**

- 41.**—(1) An employee may present a complaint to an employment tribunal that his employer—
- (a) has unreasonably refused to permit him to take time off as required under regulation 39; or
  - (b) has failed to pay the whole or any part of any amount to which the employee is entitled under regulation 40.
- (2) A tribunal shall not consider a complaint under this regulation unless it is presented—
- (a) before the end of the period of three months beginning with the day on which the time off was taken or on which it is alleged the time off should have been permitted; or
  - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
- (3) Where a tribunal finds a complaint under this regulation well-founded, the tribunal shall make a declaration to that effect.
- (4) If the complaint is that the employer has unreasonably refused to permit the employee to take time off, the tribunal shall also order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled under regulation 40 if the employer had not refused.
- (5) If the complaint is that the employer has failed to pay the employee the whole or part of any amount to which he is entitled under regulation 40, the tribunal shall also order him to pay to the employee the amount which it finds is due to him.

#### **Unfair dismissal**

- 42.**—(1) An employee who is dismissed and to whom paragraph (2) or (5) applies shall be regarded, if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in, respectively, paragraph (3) or (6), as unfairly dismissed for the purposes of Part 10 of the 1996 Act.
- (2) This paragraph applies to an employee who is—
- (a) a member of a special negotiating body;
  - (b) a member of a representative body;

- (c) an information and consultation representative;
- (d) an employee member in a supervisory or administrative organ; or
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or a representative.

(3) The reason is that—

- (a) the employee performed or proposed to perform any functions or activities as such a member, representative or candidate; or
- (b) the employee or a person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 39 or 40.

(4) Paragraph (1) does not apply in the circumstances set out in paragraph (3)(a) where the reason (or principal reason) for the dismissal is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 37, unless the employee reasonably believed the disclosure to be a 'protected disclosure' within the meaning given to that expression by section 43A of the 1996 Act.

(5) This paragraph applies to any employee whether or not he is an employee to whom paragraph (2) applies.

(6) The reasons are that the employee—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on him by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or to exercise the right to appeal in connection with any rights conferred by these Regulations;
- (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;
- (d) indicated that he did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
- (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body, a representative body, an employee member on a supervisory or administrative organ or be an information and consultation representative;
- (f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (g) voted in such a ballot;
- (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).

(7) It is immaterial for the purposes of paragraph (6)(a)—

- (a) whether or not the employee has the right or entitlement; or
- (b) whether or not the right has been infringed,

but for that sub-paragraph to apply, the claim to the right and, if applicable, the claim that it has been infringed must be made in good faith.

**Subsidiary provisions relating to unfair dismissal**

**43.**—(1) In section 105 of the 1996 Act (redundancy as unfair dismissal) in subsection (1)(c) (which requires one of a specified group of subsections to apply for a person to be treated as unfairly dismissed)(1)—

- (a) for “, (7E) and (7F)” substitute “or subsection (7E), (7F) or (7G)”, and
- (b) after subsection (7F) insert—

“(7G) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 (read with paragraphs (4) and (7) of that regulation).”

(2) In section 108(2) of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3) (cases where no qualifying period of employment is required)(3)—

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

“or

- (k) paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 applies.”.

(3) In section 109 of the 1996 Act (exclusion of right: upper age limit) in subsection (2) (cases where the upper age limit does not apply)(4)—

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

“or

- (k) paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 applies.”.

**Detriment**

**44.**—(1) An employee to whom paragraph (2) or (5) applies has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer, done on a ground specified in, respectively, paragraph (3) or (6).

(2) This paragraph applies to an employee who is—

- (a) a member of a special negotiating body;
- (b) a member of a representative body;
- (c) an information and consultation representative;
- (d) an employee member on a supervisory or administrative organ; or
- (e) a candidate in an election in which any person elected will, on being elected, be such a member or a representative.

(3) The ground is that—

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(1) Section 105 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.

(2) Section 108(1) was amended by S.I.1999/1436, Article 3.

(3) Section 108(3) has been amended on a number of occasions to specify additional cases in which no qualifying period of employment is required.

(4) Section 109(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

- (a) the employee performed or proposed to perform any functions or activities as such a member, representative or candidate; or
- (b) the employee or person acting on his behalf made or proposed to make a request to exercise an entitlement conferred on the employee by regulation 39 or 40.

(4) Paragraph (1) does not apply in the circumstances set out in paragraph (3)(a) where the ground for the subject to detriment is that in the performance, or purported performance, of the employee's functions or activities he has disclosed any information or document in breach of the duty in regulation 37, unless the employee reasonably believed the disclosure to be a "protected disclosure" within the meaning given to that expression by section 43A of the 1996 Act.

(5) This paragraph applies to any employee, whether or not he is an employee to whom paragraph (2) applies.

(6) The grounds are that the employee—

- (a) took, or proposed to take, any proceedings before an employment tribunal to enforce any right conferred on him by these Regulations;
- (b) exercised, or proposed to exercise, any entitlement to apply or complain to the CAC or the Appeal Tribunal conferred by these Regulations or to exercise the right to appeal in connection with any rights conferred by these Regulations;
- (c) acted with a view to securing that a special negotiating body, a representative body or an information and consultation procedure did or did not come into existence;
- (d) indicated that he did or did not support the coming into existence of a special negotiating body, a representative body or an information and consultation procedure;
- (e) stood as a candidate in an election in which any person elected would, on being elected, be a member of a special negotiating body, a representative body, an employee member on a supervisory or administrative organ or be an information and consultation representative;
- (f) influenced or sought to influence by lawful means the way in which votes were to be cast by other employees in a ballot arranged under these Regulations;
- (g) voted in such a ballot;
- (h) expressed doubts, whether to a ballot supervisor or otherwise, as to whether such a ballot had been properly conducted; or
- (i) proposed to do, failed to do, or proposed to decline to do, any of the things mentioned in sub-paragraphs (d) to (h).

(7) It is immaterial for the purposes of paragraph (6)(a)—

- (a) whether or not the employee has the right or entitlement; or
- (b) whether or not the right has been infringed,

but for that sub-paragraph to apply, the claim to the right and, if applicable, the claim that has been infringed must be made in good faith.

(8) This regulation does not apply where the detriment in question amounts to dismissal.

### **Detriment: enforcement and subsidiary provisions**

**45.—**(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of regulation 44.

(2) The provisions of sections 48(2) to (4) of the 1996 Act (complaints to employment tribunals and remedies) shall apply in relation to a complaint under this regulation as they apply in relation to a complaint under section 48 of that Act but taking references in those provisions to the employer as references to the employer within the meaning of regulation 44(1) above.

(3) The provisions of section 49(1) to (5) of the 1996 Act shall apply in relation to a complaint under this regulation.

### **Conciliation**

**46.** In section 18 of the Employment Tribunals Act 1996 (conciliation), in subsection (1) (which specifies the proceedings and claims to which the section applies)(**5**) after paragraph (m), insert—

“or (n) under regulation 41 or 45 of the European Public Limited-Liability Company Regulations 2004.”.

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(5) 1996 c. 17. Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.