
STATUTORY INSTRUMENTS

2004 No. 3426

The Information and Consultation
of Employees Regulations 2004

PART IX

MISCELLANEOUS

CAC proceedings

35.—(1) Where under these Regulations a person presents a complaint or makes an application to the CAC the complaint or application must be in writing and in such form as the CAC may require.

(2) In its consideration of a complaint or application under these Regulations, the CAC shall make such enquiries as it sees fit and so far as reasonably practicable give any person whom it considers has a proper interest in the complaint or application an opportunity to be heard.

(3) The CAC may draw an adverse inference from a party's failure to comply with any reasonable request to provide information or documents relevant to a complaint presented to it or an application made to it.

(4) A declaration or order made by the CAC under these Regulations may be relied on—

(a) in relation to an employer whose registered office, head office or principal place of business is in England or Wales, as if it were a declaration or order made by the High Court, and

(b) in relation to an employer whose registered office, head office or principal place of business is in Scotland as if it were a declaration or order made by the Court of Session.

(5) A declaration or order made by the CAC under these Regulations must be in writing and state the reasons for the CAC's findings.

(6) An appeal lies to the Appeal Tribunal on any question of law arising from any declaration or order of, or arising in any proceedings before, the CAC under these Regulations.

Appeal Tribunal: location of certain proceedings under these Regulations

36.—(1) Any proceedings before the Appeal Tribunal arising under these Regulations, other than appeals under paragraph (n) of section 21(1) of the Employment Tribunals Act 1996⁽¹⁾ (appeals from employment tribunals on questions of law), shall—

(a) where the registered office or, where there is no registered office, the head office or principal place of business is situated in England and Wales, be held in England and Wales; and

(b) where the registered office or, where there is no registered office, the head office or principal place of business is situated in Scotland, be held in Scotland.

(2) In section 20(4) of the Employment Tribunals Act 1996 (the Appeal Tribunal)—

(1) Section 21(1) has been amended on a number of occasions to add additional proceedings.

- (a) for “1999 and” substitute “1999,”; and
- (b) after “2004” insert “and regulation 36(1) of the Information and Consultation of Employees Regulations 2004”.

Appeal Tribunal: appeals from employment tribunals

37. In section 21(1) of the Employment Tribunals Act 1996 (circumstances in which an appeal lies to the Appeal Tribunal from an employment tribunal)—

- (a) the word “or” at the end of paragraph (n) is repealed;
- (b) in the paragraph (o) relating to the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004, for “(o)” substitute “(p)”;
- (c) after that paragraph insert—
 - “or
 - (q) the Information and Consultation of Employees Regulations 2004.”.

ACAS

38.—(1) If on receipt of an application or complaint under these Regulations the CAC is of the opinion that it is reasonably likely to be settled by conciliation or other assistance provided by the Advisory, Conciliation and Arbitration Service (‘ACAS’) in accordance with paragraph (2), it shall refer the application or complaint to ACAS and shall notify the applicant or complainant and any persons whom it considers have a proper interest in the application or complaint accordingly.

(2) Where the CAC refers an application or complaint to ACAS under paragraph (1), section 210 of the Trade Union and Labour Relations (Consolidation) Act 1992 (power of ACAS to offer assistance to settle disputes) shall apply, and ACAS may offer the parties to the application or complaint its assistance under that section with a view to bringing about a settlement, as if—

- (a) the dispute or difference between the parties amounted to a trade dispute as defined in section 218 of that Act; and
- (b) the parties to the application or complaint had requested the assistance of ACAS under section 210.

(3) If ACAS does not consider it appropriate to offer its assistance in accordance with paragraph (2) it shall inform the CAC.

(4) If ACAS has offered the parties its assistance in accordance with paragraph (2), the application or complaint referred has not thereafter been settled or withdrawn, and ACAS is of the opinion that no provision or further provision of its assistance is likely to result in a settlement or withdrawal, it shall inform the CAC of its opinion.

(5) If—

- (a) an application or complaint is not referred to ACAS, or
- (b) it is so referred, but ACAS informs the CAC as mentioned in paragraph (3) or (4),

the CAC shall proceed to hear and determine the application or complaint.

Restrictions on contracting out: general

39.—(1) Any provision in any agreement (whether an employee’s contract or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of these Regulations other than a provision of Part VIII; or

(b) to preclude a person from bringing any proceedings before the CAC or the Appeal Tribunal under any provision of these Regulations other than a provision of Part VIII.

(2) Paragraph (1) does not apply to any agreement to refrain from continuing any proceedings referred to in sub-paragraph (b) of that paragraph made after the proceedings have been instituted.

Restrictions on contracting out: Part VIII

40.—(1) Any provision in any agreement (whether an employee’s contract or not) is void in so far as it purports—

- (a) to exclude or limit the operation of any provision of Part VIII; or
- (b) to preclude a person from bringing any proceedings before an employment tribunal under that Part.

(2) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing proceedings before an employment tribunal where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996 (conciliation).

(3) Paragraph (1) does not apply to any agreement to refrain from instituting or continuing before an employment tribunal proceedings within section 18(1) of the Employment Tribunals Act 1996 (proceedings under these Regulations where conciliation is available) if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.

(4) For the purposes of paragraph (3) the conditions regulating compromise agreements are that—

- (a) the agreement must be in writing;
- (b) the agreement must relate to the particular proceedings;
- (c) the employee must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal;
- (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or a professional body, covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;
- (e) the agreement must identify the adviser; and
- (f) the agreement must state that the conditions in sub-paragraphs (a) to (e) are satisfied.

(5) A person is a relevant independent adviser for the purposes of paragraph (4)(c)—

- (a) if he is a qualified lawyer;
- (b) if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union; or
- (c) if he works at an advice centre (whether as an employee or as a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre.

(6) But a person is not a relevant independent adviser for the purposes of paragraph (4)(c)—

- (a) if he is, is employed by or is acting in the matter for the employer or an associated employer;
- (b) in the case of a person within paragraph (5)(b) or (c), if the trade union or advice centre is the employer or an associated employer; or
- (c) in the case of a person within (5)(c), if the employee makes a payment for the advice received from him.

(7) In paragraph (5)(a), “qualified lawyer” means—

- (a) as respects England and Wales, a barrister (whether in practice as such or employed to give legal advice), a solicitor who holds a practising certificate, or a person other than a barrister or a solicitor who is an authorised advocate or authorised litigator (within the meaning of the Courts and Legal Services Act 1990⁽²⁾); and
 - (b) as respects Scotland, an advocate (whether in practice as such or employed to give legal advice) or a solicitor who holds a practising certificate.
- (8) A person shall be treated as being a qualified lawyer within the meaning of paragraph (7)(a) if he is a Fellow of the Institute of Legal Executives employed by a solicitors' practice.
- (9) For the purposes of paragraph (6) any two employers shall be treated as associated if—
- (a) one is a company of which the other (directly or indirectly) has control; or
 - (b) both are companies of which a third person (directly or indirectly) has control;
- and “associated employer” shall be construed accordingly.

Amendments to the Employment Appeal Tribunal Rules 1993

- 41.** The Employment Appeal Tribunal Rules 1993⁽³⁾ shall be amended as follows—
- (a) In rule 2(1), after the definition of “the 2004 Regulations” insert—
 - ““the Information and Consultation Regulations” means the Information and Consultation of Employees Regulations 2004;”;
 - (b) In rules 3(1)(d), 3(3)(d), 4(1)(e), 5(c) and 7(1)(e), after “the 2004 Regulations” insert—
 - “or regulation 35(6) of the Information and Consultation Regulations”;
 - (c) In rule 16AA—
 - (i) after “the 2004 Regulations” insert—
 - “or regulation 22(6) of the Information and Consultation Regulations; and
 - (ii) for “those regulations” substitute “the 2004 Regulations or regulation 22(4) of the Information and Consultation Regulations”;
 - (d) In rules 26 and 31(1)(c)—
 - (i) omit “or” before “regulation 33”; and
 - (ii) after “the 2004 Regulations” insert “or regulation 22 of the Information and Consultation Regulations”;
 - (e) In the Schedule, in the heading to Form 1A—
 - (i) omit “or” before “*regulation 47(6)*”; and
 - (ii) insert at the end “*or regulation 35(6) of the Information and Consultation of Employees Regulations 2004*”; and
 - (f) In the Schedule, in Form 4B—
 - (i) in the heading, after “*Regulations 2004*” insert “*or regulation 22 of the Information and Consultation of Employees Regulations 2004*”; and
 - (ii) in paragraph 5, after “Regulations 2004” insert “or regulation 22 of the Information and Consultation of Employees Regulations 2004 (*delete which does not apply*).”.

(2) 1990 c. 41.

(3) S.I.1993/2854, amended by S.I. 1996/3216, 2001/1128 and 2004/2526.

Crown employment

42.—(1) These Regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees.

(2) In these Regulations “Crown employment” means employment in an undertaking to which these Regulations apply and which is 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.

(3) For the purposes of the application of these Regulations in relation to Crown employment in accordance with paragraph (1)—

- (a) references to an employee shall be construed as references to a person in Crown employment; and
- (b) references to a contract of employment shall be construed as references to the terms of employment of a person in Crown employment.

Exception for merchant navy

43.—(1) Subject to paragraph (3), no long haul crew member shall be—

- (a) a negotiating representative; or
- (b) an information and consultation representative.

(2) In paragraph (1), a “long haul crew member” means a person who is a member of a merchant navy crew other than—

- (a) a ferry worker; or
- (b) a person who normally works on voyages the duration of which is less than 48 hours.

(3) Paragraph (1) does not apply where the employer decides that the long haul crew member in question shall be permitted to be, as the case may be, a negotiating representative or an information and consultation representative.

(4) Where paragraph (1) applies, no long haul crew member shall—

- (a) stand as a candidate for election as a negotiating representative or an information and consultation representative; or
- (b) be appointed or elected to be a negotiating representative or an information and consultation representative.