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STATUTORY INSTRUMENTS

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**2010 No. 93**

**The Agency Workers Regulations 2010**

**PART 3**

**Liability, Protections and Remedies**

**Liability of temporary work agency and hirer**

**14.**—(1) A temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

(2) Subject to paragraph (3), the hirer shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

(3) A temporary work agency shall not be liable for a breach of regulation 5 where it is established that the temporary work agency—

- (a) obtained, or has taken reasonable steps to obtain, relevant information from the hirer about the basic working and employment conditions in force in the hirer;
- (b) where it has received such information, has acted reasonably in determining what the agency worker's basic working and employment conditions should be at the end of the qualifying period and during the period after that until, in accordance with regulation 8, the agency worker ceases to be entitled to the rights conferred by regulation 5; and
- (c) ensured that where it has responsibility for applying those basic working and employment conditions to the agency worker, that agency worker has been treated in accordance with the determination described in sub-paragraph (b),

and to the extent that the temporary work agency is not liable under this provision, the hirer shall be liable.

(4) Where the temporary work agency or hirer seeks to rely on regulation 5(3), relevant information in paragraph (3)(a) includes information that—

- (a) explains the basis on which it is considered that an individual is a comparable employee; and
- (b) describes the relevant terms and conditions which apply to that employee.

(5) Where more than one temporary work agency is a party to the proceedings, when deciding whether or not each temporary work agency is responsible in full or in part, the employment tribunal shall have regard to the extent to which each agency was responsible for the determination, or application, of any of the agency worker's basic working and employment conditions.

(6) The hirer shall be liable for any breach of regulation 12 or 13.

(7) In relation to the rights conferred by regulation 17—

- (a) a temporary work agency shall be liable for any act, or any deliberate failure to act, of that temporary work agency; and
- (b) the hirer shall be liable for any act, or any deliberate failure to act, of the hirer.

### **Restrictions on contracting out**

15. Section 203(1) of the 1996 Act (restrictions on contracting out) shall apply in relation to these Regulations as if they were contained in that Act.

### **Right to receive information**

16.—(1) An agency worker who considers that the hirer or a temporary work agency may have treated that agency worker in a manner which infringes a right conferred by regulation 5, may make a written request to the temporary work agency for a written statement containing information relating to the treatment in question.

(2) A temporary work agency that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—

- (a) relevant information relating to the basic working and employment conditions of the workers of the hirer,
- (b) the factors the temporary work agency considered when determining the basic working and employment conditions which applied to the agency worker at the time when the breach of regulation 5 is alleged to have taken place, and
- (c) where the temporary work agency seeks to rely on regulation 5(3), relevant information which—
  - (i) explains the basis on which it is considered that an individual is a comparable employee, and
  - (ii) describes the relevant terms and conditions, which apply to that employee.

(3) If an agency worker has made a request under paragraph (1) and has not been provided with such a statement within 30 days of making that request, the agency worker may make a written request to the hirer for a written statement containing information relating to the relevant basic working and employment conditions of the workers of the hirer.

(4) A hirer that receives a request made in accordance with paragraph (3) shall, within 28 days of receiving it, provide the agency worker with such a statement.

(5) An agency worker who considers that the hirer may have treated that agency worker in a manner which infringes a right conferred by regulation 12 or 13, may make a written request to the hirer for a written statement containing information relating to the treatment in question.

(6) A hirer that receives such a request from an agency worker shall, within 28 days of receiving it, provide the agency worker with a written statement setting out—

- (a) all relevant information relating to the rights of a comparable worker in relation to the rights mentioned in regulation 12 or, as the case may be, regulation 13, and
- (b) the particulars of the reasons for the treatment of the agency worker in respect of the right conferred by regulation 12 or, as the case may be, regulation 13.

(7) Paragraphs (1) and (3) apply only to an agency worker who at the time that worker makes such a request is entitled to the right conferred by regulation 5.

(8) Information provided under this regulation, whether in the form of a written statement or otherwise, is admissible as evidence in any proceedings under these Regulations.

(9) If it appears to the tribunal in any proceedings under these Regulations—

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(1) Section 203 was amended by the Employment Rights (Dispute Resolution) Act 1998 (c.8) and by the Employment Relations Act 1999 (c.26), section 44 and Schedule 9.

- (a) that a temporary work agency or the hirer (as the case may be) deliberately, and without reasonable excuse, failed to provide information, whether in the form of a written statement or otherwise, or
- (b) that any written statement supplied is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that that temporary work agency or hirer (as the case may be) has infringed the right in question.

### **Unfair dismissal and the right not to be subjected to detriment**

17.—(1) An agency worker who is an employee and is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—

- (a) that the agency worker—
  - (i) brought proceedings under these Regulations;
  - (ii) gave evidence or information in connection with such proceedings brought by any agency worker;
  - (iii) made a request under regulation 16 for a written statement;
  - (iv) otherwise did anything under these Regulations in relation to a temporary work agency, hirer, or any other person;
  - (v) alleged that a temporary work agency or hirer has breached these Regulations;
  - (vi) refused (or proposed to refuse) to forgo a right conferred by these Regulations; or
- (b) that the hirer or a temporary work agency believes or suspects that the agency worker has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) Where the reason or principal reason for subjection to any act or deliberate failure to act is that mentioned in paragraph (3)(a)(v), or paragraph 3(b) so far as it relates to paragraph (3)(a)(v), neither paragraph (1) nor paragraph (2) applies if the allegation made by the agency worker is false and not made in good faith.

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

### **Complaints to employment tribunals etc**

18.—(1) In this regulation “respondent” includes the hirer and any temporary work agency.

(2) Subject to regulation 17(5), an agency worker may present a complaint to an employment tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5, 12, 13 or 17 (2).

(3) An agency worker may present a complaint to an employment tribunal that a temporary work agency has—

- (a) breached a term of the contract of employment described in regulation 10(1)(a); or
- (b) breached a duty under regulation 10(1)(b), (c) or (d).

(4) Subject to paragraph (5), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

- (a) in the case of an alleged infringement of a right conferred by regulation 5, 12 or 17(2) or a breach of a term of the contract described in regulation 10(1)(a) or of a duty under regulation 10(1)(b), (c) or (d), with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them;
  - (b) in the case of an alleged infringement of the right conferred by regulation 13, with the date, or if more than one the last date, on which other individuals, whether or not employed by the hirer, were informed of the vacancy.
- (5) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.
- (6) For the purposes of calculating the date of the infringement, detriment or breach, under paragraph (4)(a)—
- (a) where a term in a contract infringes a right conferred by regulation 5, 12 or 17(2), or breaches regulation 10(1), that infringement or breach shall be treated, subject to subparagraph (b), as taking place on each day of the period during which the term infringes that right or breaches that duty;
  - (b) a deliberate failure to act that is contrary to regulation 5, 12 or 17(2) or 10(1) shall be treated as done when it was decided on.
- (7) In the absence of evidence establishing the contrary, a person (P) shall be taken for the purposes of paragraph (6)(b) to decide not to act—
- (a) when P does an act inconsistent with doing the failed act; or
  - (b) if P has done no such inconsistent act, when the period expires within which P might reasonably have been expected to have done the failed act if it was to be done.
- (8) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—
- (a) making a declaration as to the rights of the complainant in relation to the matters to which the complaint relates;
  - (b) ordering the respondent to pay compensation to the complainant;
  - (c) recommending that the respondent take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.
- (9) Where a tribunal orders compensation under paragraph (8)(b), and there is more than one respondent, the amount of compensation payable by each or any respondent shall be such as may be found by the tribunal to be just and equitable having regard to the extent of each respondent's responsibility for the infringement to which the complaint relates.
- (10) Subject to paragraphs (12) and (13), where a tribunal orders compensation under paragraph (8)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—
- (a) the infringement or breach to which the complaint relates; and
  - (b) any loss which is attributable to the infringement.
- (11) The loss shall be taken to include—
- (a) any expenses reasonably incurred by the complainant in consequence of the infringement or breach; and
  - (b) loss of any benefit which the complainant might reasonably be expected to have had but for the infringement or breach.

(12) Subject to paragraph (13), where a tribunal orders compensation under paragraph (8)(b), any compensation which relates to an infringement or breach of the rights—

- (a) conferred by regulation 5 or 10; or
- (b) conferred by regulation 17(2) to the extent that the infringement or breach relates to regulation 5 or 10,

shall not be less than two weeks' pay, calculated in accordance with regulation 19.

(13) Paragraph (12) does not apply where the tribunal considers that in all the circumstances of the case, taking into account the conduct of the claimant and respondent, two weeks' pay is not a just and equitable amount of compensation, and the amount shall be reduced as the tribunal consider appropriate.

(14) Where a tribunal finds that regulation 9(4) applies and orders compensation under paragraph (8)(b), the tribunal may make an additional award of compensation under paragraph 8(b), which shall not be more than £5,000, and where there is more than one respondent the proportion of any additional compensation awarded that is payable by each of them shall be such as the tribunal considers just and equitable having regard to the extent to which it considers each to have been responsible for the fact that regulation 9(4)(a) applies.

(15) Compensation in respect of treating an agency worker in a manner which infringes the right conferred by regulation 5, 12 or 13 or breaches regulation 10(1)(b), (c) or (d), or breaches a term of the contract described in regulation 10(1)(a), shall not include compensation for injury to feelings.

(16) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) the law of Scotland.

(17) Where the tribunal finds that the act, or failure to act, to which the complaint relates 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.

(18) If a temporary work agency or the hirer fails, without reasonable justification, to comply with a recommendation made by an employment tribunal under paragraph (8)(c) the tribunal may, if it thinks it just and equitable to do so—

- (a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under paragraph (8)(b); or
- (b) make an order under paragraph (8)(b).

### **Calculating a week's pay**

**19.—**(1) For the purposes of regulation 18(12)—

- (a) a week's pay shall be the higher of—
  - (i) the average weekly pay received by the agency worker, in relation to the assignment to which the claim relates, in the relevant period; and
  - (ii) the average weekly pay the agency worker should have been receiving by virtue of regulation 5, in relation to the assignment to which the claim relates, in the relevant period; and
- (b) for the purposes of this paragraph, only payments in respect of basic pay whether by way of annual salary, payments for actual time worked or by reference to output or otherwise shall be taken into account.

(2) The relevant period is —

- (a) where the assignment has ended on or before the date the complaint was presented to the tribunal under regulation 18(2), the four week period (or in a case where the assignment

was shorter than four weeks, that period) ending with the last day of the assignment to which the claim relates; or

- (b) where the assignment has not so ended the four week period (or in the case where that assignment was shorter than four weeks, that period) ending with the date of the complaint.

**Liability of employers and principals**

**20.**—(1) Anything done by a person in the course of employment shall be treated for the purposes of these Regulations as also done by their employer, whether or not it was done with that employer’s knowledge or approval.

(2) Anything done by a person as agent for the employer with the authority of the employer shall be treated for the purposes of these Regulations as also done by the employer.

(3) In proceedings under these Regulations against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she took such steps as were reasonably practicable to prevent the employee from—

- (a) doing that act; or
- (b) doing, in the course of his or her employment, acts of that description.