STATUTORY RULES OF NORTHERN IRELAND

# 2016 No. 242

# EMPLOYMENT

# The Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016

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| *Made - - - -* | *10th June 2016* |
| *Coming into operation* | *18th June 2016* |

The Department for the Economy [F1] is a Department designated [F2] for the purposes of section 2(2) of the European Communities Act 1972 [F3] in relation to employment rights and duties and services in the internal market.

The Department, in exercise of the powers conferred by section 2(2) of the European Communities Act 1972, makes the following Regulations.

**F1** Section 1(3) of the Departments Act (NI) 2016 (c.5). Formerly known as the Department of Higher and Further Education, Training and Employment; see **Article 3(1)(c)** and Schedule 1 of the Departments (NI) Order 1999 (S.I.1999/283 (N.I. 1) and renamed the Department for Employment and Learning; *see* the Department for Employment and Learning Act (Northern Ireland) 2001 (c. 15).

**F2** Article 2 of, and the Schedule to, the European Communities (Designation) Order 2000 (S.I. 2000/738); article 2 of the European Communities (Designation) Order 2009 (S.I. 2009/221).

**F3** 1972 c. 68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c. 51), **section 27(1)** and the European Union (Amendment) Act 2008 (c. 7), **section 3(3)**.

## PART 1

### General

**Citation and commencement**

**1.** These Regulations may be cited as the Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016 and come into operation on 18th June 2016.

**Interpretation**

**2.**—(1) In these Regulations—

"Directive 96/71/EC" means Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [F4];

"Directive 2014/67/EU" means Council Directive 2014/67/EU of the European Parliament and the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [F5].

"the Department" means the Department for the Economy.

(2) The Interpretation Act (Northern Ireland) 1954 [F6] shall apply to these Regulations as it applies to an Act of the Assembly.

**F4** OJ No L 18, 21.1.1997, p. 1.
**F5** OJ No L 159, 28.05.2014, p. 11.
**F6** 1954 c.33 (N.I)

# PART 2

## Posted Workers in the Construction Sector

### Scope of application of this Part

**3.**—(1) This regulation and regulations 4 to 7 apply to a posted worker in the construction sector who—

(a) is working or has worked in Northern Ireland; and

(b) is working or has worked for the employer to perform services that relate to the employer's contractual obligations to the contractor.

(2) For the purposes of this regulation and regulations 4 to 7—

"contractor" means a person with whom the employer has contracted to provide services;

**[**[F7]"employer" means a service provider established in the United Kingdom or a Member State which posts or hires out workers in a manner described by paragraph 3 of Article 1 of Directive 96/71/EC;**]**

"posted worker in the construction sector" means a worker who—

(a) normally works in a Member State [F8]... but, for a limited period, carries out work on behalf of the employer in Northern Ireland; and

(b) undertakes building work relating to the construction, repair, upkeep, alteration or demolition of buildings including any of the following—

(i) excavation;

(ii) earthmoving;

(iii) actual building work;

(iv) assembly and dismantling of prefabricated elements;

(v) fitting out or installations;

(vi) alterations;

(vii) renovation;

(viii) repairs;

(ix) dismantling;

(x) demolition;

(xi) maintenance;

(xii) upkeep, painting and cleaning work; and

(xiii) improvements.

**[**F9(3) For the purposes of the definition of "employer" in paragraph (2), paragraph 3 of Article 1 of Directive 96/71/EC is to be read as if—

(a) in point (a)—

(i) after "post workers to" there were inserted " the United Kingdom or ";

(ii) after "operating in" there were inserted " the United Kingdom or ";

(b) in point (b), after "by the group in" there were inserted " the United Kingdom or ";

(c) in point (c), after "operating in" there were inserted " the United Kingdom or ".**]**

**F7** Words in reg. 3(2) substituted (31.12.2020) by The Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 (S.I. 2019/537), reg. 1(1), **Sch. para. 10(2)(a)(i)**; 2020 c. 1, Sch. 5 para. 1(1)

**F8** Words in reg. 3(2) omitted (31.12.2020) by virtue of The Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 (S.I. 2019/537), reg. 1(1), **Sch. para. 10(2)(a)(ii)**; 2020 c. 1, Sch. 5 para. 1(1)

**F9** Reg. 3(3) inserted (31.12.2020) by The Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 (S.I. 2019/537), reg. 1(1), **Sch. para. 10(2)(b)**; 2020 c. 1, Sch. 5 para. 1(1)

### Right not to suffer unauthorised deductions

**4.**—(1) This regulation applies if a posted worker in the construction sector is remunerated by the employer for any pay reference period commencing on or after the date these Regulations come into operation at a rate that is less than the national minimum wage.

(2) The contractor is to be treated for the purpose of these Regulations as having made an unauthorised deduction of the relevant sum from the worker's wages.

(3) In this regulation and in regulation 5 the "relevant sum" means the proportion of the amount due to the worker as additional remuneration in respect of the pay reference period, calculated in accordance with section 17 of the National Minimum Wage Act 1998 F10 (non-compliance: worker entitled to additional remuneration), which is the same as the proportion of the pay reference period during which the worker carried out work relating to the employer's obligations to the contractor.

(4) In this regulation—

"national minimum wage" has the same meaning as in the National Minimum Wage Act 1998;

"pay reference period" has the meaning given by regulation 6 of the National Minimum Wage Regulations 2015 F11.

**F10** 1998 c. 39; section 17 was amended by section 8 of the Employment Act 2008 (c. 24).

**F11** S.I.2015/621.

### Complaints to industrial tribunals

**5.**—(1) A posted worker in the construction sector may present a complaint against a contractor to an industrial tribunal that the contractor is to be treated as having made an unauthorised deduction of the relevant sum from the worker's wages by virtue of regulation 4(2).

(2) Paragraph (1) does not apply to a posted worker in the construction sector who has—

(a) presented a claim against the employer under Article 55 (1)(a) of the Employment Rights (Northern Ireland) Order 1996 [F12] (deductions from worker's wages in contravention of Article 45 of that Order) to an industrial tribunal in respect of the sum due; or

(b) commenced other civil proceedings against the employer for the recovery, on a claim in contract, of the sum due.

(3) In any complaint brought under paragraph (1), it is a defence for the contractor to show that it exercised all due diligence to ensure that the worker's employer would remunerate the worker in respect of the relevant sum due to the worker.

(4) Subject to paragraph (6) **[**[F13]and regulation 5A**]** an industrial tribunal must not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning with the date of payment of the relevant wages from which the deduction was made.

(5) Where a complaint is brought under this regulation in respect of a series of deductions, the reference in paragraph (4) to the deduction is to the last deduction in the series.

(6) Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this regulation to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(7) A posted worker in the construction sector who presents a complaint under this regulation is prohibited from—

(a) presenting a complaint against the employer under Article 55(1)(a) of the Employment Rights (Northern Ireland) Order 1996 (deductions from worker's wages in contravention of Article 45 of that Order) to an industrial tribunal in respect of the sum due; or

(b) commencing other civil proceedings against the employer for the recovery, on a claim in contract, of the sum due,

unless the tribunal dismisses the complaint under this regulation in accordance with paragraph (3).

**F12** S.I.1996/1919 (N.I 16)
**F13** Words in reg. 5(4) inserted (27.1.2020) by The Industrial Tribunals (1996 Order) (Application of Conciliation Provisions) Order (Northern Ireland) 2020 (S.R. 2020/4), art. 1, **Sch. para. 61**

### **[**[F14]Extension of time limit to facilitate conciliation before institution of proceedings

**5A.**—(1) In this regulation—

(a) Day A is the day on which the posted worker in the construction sector complies with the requirement in paragraph (1) of Article 20A of the Industrial Tribunals (Northern Ireland) Order 1996 (requirement to contact Labour Relations Agency before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which that worker receives or, if earlier, is treated as receiving (by virtue of regulations made under paragraph (11) of that Article) the certificate issued under paragraph (4) of that Article.

(2) In working out when the time limit set by regulation 5(4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(3) If the time limit set by regulation 5(4) would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(4) The power conferred on the industrial tribunal by regulation 5(6) to extend the time limit set by paragraph (4) of that regulation is exercisable in relation to that time limit as extended by this regulation.**]**

**F14** Reg. 5A inserted (27.1.2020) by The Industrial Tribunals (1996 Order) (Application of Conciliation Provisions) Order (Northern Ireland) 2020 (S.R. 2020/4), art. 1, **Sch. para. 62**

### Determination of complaints

**6.**—(1) Where a tribunal finds a complaint under regulation 5 well-founded, it must make a declaration to that effect and must order the contractor to pay to the worker the relevant sum treated as deducted by the contractor from the worker's wages.

(2) Where a tribunal makes a declaration under paragraph (1), it may order the contractor to pay to the worker (in addition to any amount ordered to be paid under that paragraph) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by the worker which is attributable to the matter complained of.

(3) Where, in the case of a complaint made under regulation 5, a tribunal finds that, although neither of the conditions set out in Article 45(1)(a) and (b) of the Employment Rights (Northern Ireland) Order 1996 was satisfied with respect to the whole amount of the deduction, one of those conditions was satisfied with respect to any lesser amount, the amount of the deduction must for the purposes of paragraph (1) be treated as reduced by the amount with respect to which that condition was satisfied.

(4) A tribunal may not order a contractor to pay or to repay to the worker any amount in respect of a deduction, or in respect of any combination of deductions, in so far as it appears to the tribunal that the contractor or the worker's employer has already paid or repaid any such amount to the worker.

### Restrictions on contracting out

**7.**—(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of these Regulations, or

(b) to preclude a person from bringing proceedings under these Regulations before an industrial tribunal.

**[**[F15](2) Paragraph (1) does not apply to—

(a) any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of Articles 20A to 20C of the Industrial Tribunals (Northern Ireland) Order 1996 (conciliation); or

(b) any agreement to refrain from instituting or continuing proceedings if the conditions regulating compromise agreements under these Regulations are satisfied in relation to the agreement.**]**

(3) For the purposes of **[**[F16]paragraph (2)(b)**]** the conditions regulating compromise agreements under these Regulations are that—

(a) the agreement must be in writing;

(b) the agreement must relate to the particular complaint;