Statutory Protections for Employees Acting as a Pension Trustee

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Employees commonly act as trustees of occupational pension schemes of their employer. Often the trustee will actually be a trustee company[1] (perhaps a wholly-owned subsidiary of the employer), in which case employees also commonly act as directors of the corporate trustee.

This article looks at the various protections given to such employee trustees under the Employment Rights Act 1996 (ERA 1996). The specific statutory protections under ERA 1996 are:

- a protection against suffering detriment from the employer for actions as a trustee (or director of a corporate trustee) – s 46;
- a dismissal by reason of being a trustee will be automatically unfair (and so within the unfair dismissal provisions of ERA 1996) and the usual requirement for unfair dismissal claims of a qualifying period of two years' continuous service does not apply– s 102; and
- a right to time off during working hours with pay for acting as an employee trustee or undergoing training– ss 58 and 59.

Appointment of a trustee

The appointment of an individual employee as a trustee (or director of a corporate trustee) will take effect under the usual rules for appointing trustees (or directors), namely:

- by the principal company of the pension scheme under the provisions governing the scheme (or for a corporate trustee under its articles of association); or
- as a member-nominated trustee (MNT) (or member-nominated director (MND) if a corporate trustee) under the arrangements made under the statutory provisions in the Pensions Act 2004;[2] or
- under any specific election provisions applicable to the relevant pension scheme under its rules (these can be different and include more member-nominated trustees (or directors) than would apply to the statutory regime; or

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1 See *Freshfields on Corporate Pensions Law 2015* (Bloomsbury Professional, 2015) at 11.2 (advantages and disadvantages of a separate trustee company).

2 See ss 241 to 243 of the Pensions Act 2004 and *Freshfields on Corporate Pensions Law 2015* at 11.1 (Member-nominated Trustees). The 2004 Act provisions simplified and replaced the MNT and MND provisions under the Pensions Act 1995.

- as a trustee by appointment by the court[3] (under its inherent powers) or by the Pensions Regulator[4] under its powers in the Pensions Act 1995 (this is relatively unusual).

Connected with the introduction of the MNT/MND provisions under the Pensions Act 1995 (with effect from April 1997), the 1995 Act envisaged various statutory protections for individual employees acting as trustees. The 1995 Act provisions were repealed and replaced by equivalent provisions in the Employment Rights Act 1996.[5]

Directors of corporate trustees

These protections in ERA 1996 were, from April 2000,[6] extended to employees acting as a director of a relevant corporate trustee by the Welfare Reform and Pensions Act 1999.[7] Before the 1999 Act amendments, the statutory protections only applied to an employee acting as a trustee, and not to an employee acting as a director of a trustee company.[8]

References below to a trustee or employee/trustee should be taken as including a director of a corporate trustee.

Indemnities and exonerations?

There is no statutory provision requiring the employer (or indeed the pension scheme out of its assets) to indemnify or exonerate an individual acting as a trustee (or director of a trustee company) in relation to any liabilities he or she incurs as a consequence of acting in such a role. In practice, however it is usually the case that pension scheme trust deeds include various protections,[9] including:

- a general exoneration for matters carried out in good faith, etc;
- an extended indemnity out of the assets of the scheme for liabilities incurred in good faith etc (ie wider than the implied indemnity under the Trustee Act 2000 for liabilities 'properly' incurred[10]); and
- an indemnity from the employer (again for liabilities incurred in good faith, etc). An indemnity from the employer is perhaps less common than one out of the scheme assets. If such an indemnity from the employer applies, it can be complicated as to whether the

3 See, eg in a pensions context, *The Pensions Regulator v Dalriada Trustees Ltd* [2013] EWHC 4346 (Ch), [2014] 024 PBLR (027) (Nugee J).

4 Under ss 3, 4 and 7 of the Pensions Act 1995. See Chapter 7 'Pension Regulator's Powers to Appoint, Remove or Disqualify Trustees' in David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013).

5 See ss 58 to 60 of ERA 1996, consolidating ss 42 to 46, of the Pensions Act 1995 (see Sched 3 of Pt 1 to ERA 1996). The ERA sections commenced on 6 October 1996 under the Employment Rights Act 1996 (Residuary Commencement No 1) Order 1996 (SI 1996/2514).

6 See the Welfare Reform and Pensions Act 1999 (Commencement No 4) Order 2000 (SI 2000/1047).

7 See para 19, Sched 2.

8 Acting as a director of a trustee company is clearly a different role and legal capacity to acting as a trustee: see for example *Holland v HMRC* [2010] UKSC 51, [2011] 1 All ER 430 (sole director (A) of a company (B) that was also a director of a third company (C) – A held not to be a de facto director of C) and *Monevento Holdings Pty Ltd v Scaffidi* [2012] HCA 48 (company, with individual (Z) as sole shareholder and director, could be appointed as sole trustee, even though power of appointment prohibited Z from himself being appointed as a trustee).

9 See generally Chapter 14 'Trustee Indemnities and Exonerations' in David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013).

10 Section 31 of the Trustee Act 2000, replacing s 30(2) of the Trustee Act 1925.

trustee can claim on it only after having claimed on the assets of the scheme (or on any insurance).[11]

Sometimes these exonerations and indemnities are more limited where the individual is acting in a professional capacity (eg as a paid trustee). It would be a question of construction of the individual provision whether or not such a restriction applies to an individual who is also an employee of an employer and hence is remunerated (directly or indirectly[12]) for acting as a trustee or director of a corporate trustee.

Such indemnities and exonerations provide some protection for employees acting as trustees. But the statutory protections under ERA 1996 can go further (eg covering detriment and not just liabilities).

Statutory protections under ERA 1996

The specific statutory protections under ERA 1996 are:

- a protection against suffering detriment from the employer for actions as a trustee (or director of a corporate trustee) – s 46;
- a dismissal by reason of being a trustee will be automatically unfair (and so within the unfair dismissal provisions of ERA 1996) and the usual requirement for unfair dismissal claims of a qualifying period of two years' continuous service does not apply – s102; and
- a right to time off during working hours with pay for acting as an employee trustee or undergoing training – ss 58 and 59.

These protections are similar to those applicable under ERA 1996 to employees acting in other capacities, for example: jury service (s 43M); health and safety representatives (s 44); employee representatives (or candidates) for consultation purposes (s 47); employees with a right time off for statutory training (ss 47A and 47AA); and leave for family and domestic reasons (s 47C). There is a similar protection for workers from detriment arising from the right to automatic enrolment for pensions purposes: s 55 of the Pensions Act 2008.

Other employment statutes contain protections against detriment for employees on various grounds, eg the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) and the Equality Act 2010. These provisions will be read together with those in ERA 1996 in an attempt to form a coherent code: *Woodward v Abbey National plc*.[13]

The statutory protections only apply to employees acting as trustees of a relevant pension scheme. They do not apply to employees acting as trustees of another form of employment related trust,[14] for example in relation to an employee share scheme.[15]

11 See, eg *Alitalia-Linee Italiane SPA v Rotunno* [2008] EWHC 185 (Ch) (Henderson J) and *Oakhurst Property Developments v Blackstar (Isle of Man) Ltd* [2013] EWHC 1363 (Ch) (Gabriel Moss QC) at [93], discussed at 14.121 in Pollard, *The Law of Pension Trusts*.

12 Directly if he or she receives extra remuneration for acting as a trustee. Indirectly if he or she receives their normal remuneration while acting as such a trustee – including under ss 58 and 59 of ERA 1996.

13 [2006] EWCA Civ 822, [2006] IRLR 677.

14 Unless it fell within the (complex) definition of an occupational pension scheme – see below.

15 Contrast that the exemption (from connected person status) for trustees of a pension scheme is expressly extended to cover trustees of an employees' share scheme under s 346(3)(b) of the Companies Act and s 252(2)(c) of the Companies Act 2006.

Protections only for current employees

The ERA 1996 pensions protections only apply to 'employees' (and not, say, the wider class of 'workers'). The usual definition of employee for the purposes of ERA 1996 applies – s 230(1) of ERA 1996.

The protections apply to all employees who act as a trustee (or director of a corporate trustee) of a relevant pensions scheme. The protections are not limited to (say) those who act as a member-nominated trustee or director (MNT or MND) under the Pensions Act 2004.

The protections do not seem to apply to a former employee (eg a pensioner acting as a trustee), even if he or she used to be employed by the employer. In practice there is presumably no scope for dismissal or a need for time off from the former employer. There could presumably still be the potential for some form of detriment from the former employer, but the scope for this may well be small.

The ERA 1996 protections are not subject to the employee/trustee having a minimum level of continuous service with the employer.

The protections apply to crews of a fishing vessel,[16] but not to foreign merchant seamen – ss 199(7) and (8) of ERA 1996.

Overseas employment outside the UK was formerly excluded by s 196 of ERA 1996, but this exclusion was deleted from 25 October 1999 by s 32 of the Employment Relations Act 1999.[17] There must still be some connection with Great Britain for the protections to apply. The relevant case law on the extra-territoriality of ERA 1996 will apply, in particular *Lawson v Serco Ltd*[18] and *Ravat v Halliburton*.[19]

Protections only for trustees (or trustee directors)

It seems that the employee must be a trustee (or director of a corporate trustee). The protections do not extend to a prospective trustee (eg a candidate for election as a trustee) or to others involved with the pension scheme (eg a pensions manager or secretary to the trustee).

An employee who acts and is treated as a trustee or director can be called a 'de facto' trustee or 'trustee de son tort'[20] or de facto director,[21] even if not validly appointed or not operating under the name of trustee (or director).

Although the term 'trustee' or 'director' is not defined in ERA 1996, it seems likely that the protections would be considered to apply to such a de facto trustee (on the basis that he

16 Section 199(2) does not apply to s 46.

17 See SI 1999/2830.

18 [2006] UKHL 3, [2006] 1 All ER 823, HL. See the outline on this in David Pollard, *Corporate Insolvency: Employment and Pension Rights*, 5th ed, (Bloomsbury Professional, 2013) at 23.23 and 69.2.

19 [2012] UKSC 1, [2012] 2 All ER 905.

20 See eg *Taylor v Davies* [1920] AC 636 at 651 (Viscount Cave) and *Williams v Central Bank of Nigeria* [2014] UKSC 31, [2014] AC 1189 at [9] per Lord Sumption. In *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366 at [138], Lord Millett commented that:

> 'Substituting dog Latin for bastard French, we would do better today to describe such persons as de facto trustees. In their relations with the beneficiaries they are treated in every respect as if they had been duly appointed. They are true trustees and are fully subject to fiduciary obligations.'

See also *Lewin on Trusts*, 19th ed (Sweet & Maxwell, 2015) at 7-017 and 42-101 and Paul Davies, *Accessory Liability* (Hart Publishing, 2015) at 90.

21 See eg s 1261(1) of the Companies Act 2006, providing that the term 'director', in relation to a body corporate, 'includes any person occupying in relation to it the position of a director (by whatever name called) and any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the body are accustomed to act'. Discussed in *Holland v HMRC* [2010] UKSC 51, [2011] 1 All ER 430.

or she should be treated in the same way as an express trustee[22]). However, it will probably not apply to an individual employee who is only made liable as a constructive trustee by reason of his or her knowing receipt of trust property.[23]

The position of a de facto director may be a little less clear (the de facto term generally flowing from the definition in the Companies Acts, which does not expressly apply to ERA 1996[24]), but it is considered likely that a court will find that a de facto director will have the same protections.

Applicable pension schemes

It is not all positions as a trustee (or director of a corporate trustee) of a pension scheme that are protected under these provisions in ERA 1996. In order for the specific protections to apply it is clear that the scheme must:

- be an 'occupational pension scheme', as defined in s 1 of the Pension Schemes Act 1993 – ss 46(3), 58(3)(a) and 102(3) of ERA 1996;
- be established under a trust – ss 46(3), 58(3)(a) and 102(3) of ERA 1996; and
- in relation to:
  - the protections against detriment or dismissal, be a scheme which 'relates to his employment' – ss 46(1) and 102(1) of ERA 1996; or
  - the right to time off, be a scheme in relation to which his or her employer is 'the employer of persons in the description or category of employment to which the scheme relates' – s 58(3) of ERA 1996.

Occupational pension scheme

The relevant pension scheme must be an occupational pension scheme, as defined in s 1 of the Pension Schemes Act 1993. This is a complex definition[25] which was substantially amended[26] from September 2005 by the Pensions Act 2004. Broadly it covers pension arrangements set up by an employer, including group arrangements, whether registered for tax purposes (under the Finance Act 2004) or not. It does not cover:

- personal pension schemes; or
- schemes with their 'main administration' in an EU or EEA Member State other than the UK;[27] or
- (probably) a scheme providing only life cover benefits.[28]

22 *Soar v Ashwell* [1893] 2 QB 390, CA, per Lord Esher MR at p 394. Cited in Paul Davies *Accessory Liability* (Hart Publishing, 2015) at p 90.

23 *Williams v Central Bank of Nigeria* [2014] UKSC 31, [2014] AC 1189 at [9] per Lord Sumption – such a constructive trustee should not be treated as a trustee for limitation purposes (contrasting with a de facto trustee).

24 For an example of cross reading of terms between statutes (albeit in another context), see Andrews J in *Granada Group Ltd v Law Debenture Pension Trust* [2015] EWHC 1499 (Ch) at [75] looking at the definition of 'pension scheme'.

25 See Chapter 1 in Pollard, *The Law of Pension Trusts*.

26 The new definition will apply for the purposes of ERA 1996 – see s 20 of the Interpretation Act 1978.

27 The theory being that such schemes are governed by the relevant laws of the relevant other Member State under EU Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (the 'IORP Directive').

28 This arguably is the effect of s 255 of the Pensions Act 2004 which requires occupational pension schemes to limit their activities to 'retirement benefit activities'. See 1.42 in Pollard, *The Law of Pension Trusts*.

The ERA 1996 protections were extended in October 2001[29] to cover acting as a trustee of a stakeholder scheme designated by the employer (ie even if this was not an occupational pension scheme), but this extension was reversed from October 2012[30] by the Pensions Act 2008 (stakeholder schemes are to cease operation in due course, as auto-enrolment takes full effect).

Established under trust

For the protections to apply the pension scheme must also be one established under a trust. Most private sector occupational pension schemes which are registered for tax purposes will be established under trust. Section 252(2) of the Pensions Act 2004 requires a UK based occupational pension scheme to be 'established under irrevocable trusts' before any funding payment[31] is accepted.[32] Section 252 however does not apply[33] to an occupational pension scheme which is:

- a public service pension scheme;[34] or
- an occupational pension scheme with fewer than two members; or
- an occupational pension scheme which:
  - has fewer than 100 members;[35]
  - provides relevant benefits;[36] and
  - is neither:
    - a relevant statutory scheme;[37] nor
    - a tax registered scheme.[38]

Public service pension schemes (eg the NHS scheme, the Teachers' scheme) are usually established under legislation and not under trust. The protections in ERA 1996 will not apply.

A simple contractual promise from an employer to an employee to pay a pension will not be a scheme established under trust. Such a scheme may well be an 'occupational pension scheme',[39] but the ERA 1996 protections will not apply (indeed there may be no trustees in any event).

29 Section 6 of the Welfare Reform and Pensions Act 1999, with effect from 8 October 2001 (SI 2000/1047).

30 Section 87(13) of the Pensions Act 2008 with effect from 1 October 2012 (SI 2012/2480).

31 A funding payment is a payment to the scheme (ie presumably not direct to the member) to fund benefits for or in respect of any or all of the members – s 252(6), of the PA 2004.

32 In addition the rules stipulating the scheme benefits and conditions must be in force – s 252(3).

33 Section 252(4) of the Pensions Act 2004 and the Occupational Pension Schemes (Trust and Retirement Benefits Exemption) Regulations 2005 (SI 2005/2360).

34 The term 'public service pension scheme' has the meaning given by s 1(1) of the Pension Schemes Act 1993 (categories of pension schemes), ie an occupational pension scheme established by or under an enactment or the Royal prerogative or a Royal charter, and which cannot be amended save with the consent of a Minister.

35 This 100-member requirement tracks the limits in the EU IORP Directive.

36 The term 'relevant benefits' has, from 6 April 2006, the meaning given by s 393B of the Income Tax (Earnings and Pensions) Act 2003 (relevant benefits), eg benefits payable on retirement or death, but not benefits on ill-health or on death by accident.

37 The term 'relevant statutory scheme' has the meaning given by s 611A of the Income and Corporation Taxes Act 1988 (definition of relevant statutory scheme). Section 611A has been repealed, but in any event all relevant statutory schemes in place at the end of 5 April 2006 became registered schemes: Finance Act 2004, Sched 36, para 1(1)(c).

38 Ie registered for tax purposes under the Finance Act 2004 (or before 6 April 2006 approved under the previous tax regime in the Income and Corporation Taxes Act 1988).

39 But note that there is no express reference in s 1 of the PSA 1993 to a scheme as covering just one person. Section 1(5) of PSA 1993 refers to the plural: 'so as to provide benefits to or in respect of people'. Similarly the tax definition refers to the plural: 'benefits to or in respect of persons' – s 150(1) of Finance Act 2004. Contrast the provisions under the old tax legislation in relation to pension in the Income and Corporation Taxes Act 1988, s 611(2) (now repealed):

There could be a trustee in relation to such an unfunded promise, for example to hold the benefit of the contractual promise for spouses and dependants or to hold security granted for the promise. It is less clear whether an employee/trustee acting as such in relation to such a scheme would be within the ERA 1996 protections. Arguably the scheme itself has not been 'established under trust'.

In *Granada Group Ltd v Law Debenture Pension Trust*,[40] Andrews J gave an extended meaning to an exemption[41] under the Companies Acts applicable to the trustee of an occupational pension scheme and held that it covered a trustee holding security for a contractual promise (although in that case the promise/scheme stated that it was established under trust[42]). In practice it is likely that a similar wide approach would apply to the ERA 1996 protections.

A pension scheme of the employer

The relevant pension scheme (of which the employee is a trustee) must be one of the employer. An employee cannot complain under the ERA 1996 statutory provisions if he is or she is victimised for acting as a trustee of some other employer's pension scheme (even seemingly a scheme of another company in the employer's group).

The protections were extended in 2000 to apply to directors of a corporate trustee in the same way as they apply for individual trustees.[43] There is no requirement that the corporate trustee be a subsidiary (or in the same group of companies as) the employer. The trustee company could (for example) be owned by the directors themselves.[44] Provided the trustee company is acting as trustee of a pension scheme of the employer, the protection applies.

It is clear from the definition of 'relevant occupational pension scheme' and the requirements in ss 46(1) and 102(1) that the scheme must be one which 'relates to [the employee's] employment'. Clearly this will be the case where the employee is a member of the scheme and is still accruing pensionable service and benefits under the scheme because of his or her employment, ie he is an active member (using the terminology in the pensions legislation).

The test for a relevant occupational pension scheme under s 59 (time-off) is different. The employer (and hence the person granting the time-off, etc) must be an employer in relation to the relevant occupational pension scheme, ie 'an employer of persons in the description or category of[45] employment which the scheme relates' – s 58(3)(b). This is discussed further below.

The position is less clear where the employee is not an active member because:

- he or she has never been an active member because he or she never joined the scheme (eg it was closed to new entrants before the employee joined the company); or

cont.

'References in this Chapter to a scheme include references to a deed, agreement, series of agreements, or other arrangements providing for relevant benefits notwithstanding that it relates or they relate only to:

(a) a small number of employees, or to a single employee ….'

It may be that the plural would be treated as including the singular – s 6(c) of the Interpretation Act 1978.

40 [2015] EWHC 1499 (Ch) (Andrews J).

41 Section 346(2)(c) of the Companies Act 1985 includes in the definition of 'connected person' 'a person acting in his capacity as trustee of any trust the beneficiaries of which include … the director, his spouse or civil partner or any children or step-children of his …' but s 346(3)(b) provides that that paragraph 'does not apply to a person acting in his capacity as trustee under an employees' share scheme or a pension scheme.'

The 1985 Act exemption is repeated in similar terms in s 252(2)(c) of the Companies Act 2006.

42 See [2015] EWHC 1499 (Ch) at para [87].

- he or she is a member, but no longer an active member because the scheme has been closed to future accrual of benefits (eg frozen).

In such cases, is the employee/trustee a trustee of a scheme within the ERA 1996 protections?

The point is undecided in any reported case, but in the first situation above (employee has become a trustee but has never been a scheme member[46]) the protections seem not to apply. The scheme relates not to the employee/trustee's employment, but to the employment (or former employment) of others.

However, it seems more likely that the courts and tribunals would construe the ERA 1996 protections as applying in the second situation above (where the employee trustee is a scheme member, albeit a deferred member), even where the employee is not an active member. In relation to a scheme which is frozen, where the employee used to be an active member, then it looks more arguable that the courts would construe the requirement that the scheme to be one which 'relates' to the individual employee/trustee's employment as being one that covers schemes which used to relate to such employment.[47]

Detriment – ERA 1996, s 46

Section 46 contains a protection against 'detriment' by the employer[48] and states:

> **'46 Trustees of occupational pension schemes**
>
> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that, being a trustee of a relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.
>
> (2) This section does not apply where the detriment in question amounts to dismissal (within the meaning of Part X).[49]
>
> (2A) This section applies to an employee who is a director of a company which is a trustee of a relevant occupational pension scheme as it applies to an employee who is a trustee of such a scheme (references to such a trustee being read for this purpose as references to such a director).

43 See the Welfare Reform and Pensions Act 1999 (and above).

44 On ownership of a pension trustee company, see 4.31 and 4.32 in David Pollard, *The Law of Pension Trusts*.

45 The words 'or category' are to be deleted by the Pensions Act 2004, s 320 from a day to be appointed. Nothing seems to turn on this: see Warren J in the Marine Pilots case, *PNPF Trust Co Ltd v Taylor* [2010] EWHC 1573 (Ch) at [462].

46 For example he or she is appointed by the employer or under the relevant MNT/MND election process even without having been a member. MNT and MND rules can allow the selection of a person to act as an MNT/MND even though not a member of the scheme, but only if the employer agrees – ss 241(5)(c) and 242(5)(c) of the Pensions Act 2004.

47 But contrast the decision (on different statutory wording) in *Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch). Asplin J held that an employer ceased to be an employer in relation to a scheme when the scheme was closed for future accrual, even though some benefits continued to be at a higher level for members remaining in relevant employment.

48 For a general discussion of the detriment provisions in ERA 1996, see Division DII (Detriment) of *Harvey on Industrial Relations and Employment Law* (Lexis Nexis).

49 Section 46(2) was amended in 1999 so that the words 'Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal,' were repealed from 25 October 1999: Employment Relations Act 1999, ss 18(2)(a), 44, Sched 9(3); commencement SI 1999/2830. Section 197 excluded some fixed term contracts from the dismissal provisions in Part X, but was also repealed by the Employment Relations Act 1999.

(3) In this section ''relevant occupational pension scheme'' means an occupational pension scheme (as defined in section 1 of the Pension Schemes Act 1993) established under a trust.'

Under the detriment protection in s 46, four features must apply:

(a) the employee/trustee must have suffered some 'detriment';
(b) the detriment must be caused by 'any act or any deliberate failure to act' by his employer.
(c) the employee must be subject to the detriment because (ie 'on the ground that'):
  (i) he or she was a trustee of a relevant occupational pension scheme; and
  (ii) he or she 'performed (or propose to perform) any functions as such a trustee.' – s 46(1) of ERA 1996.

The detriment provision does not apply where the detriment relates to a dismissal within the meaning of Part X of ERA 1996 – s 46(2). This is because dismissal of an employee by reason of having being a relevant trustee (or director of a corporate trustee) is covered by the separate protections in Part X of ERA 1996, ie s 102 of ERA 1996 (see below).

Section 46 does not, on a literal interpretation, give protection where the employer subjects the employee to a detriment merely because the employee is a trustee, as opposed to any actions the employee performed or proposes to perform as such a trustee. But it seems likely that such a detriment on the grounds of a status (being a trustee) would be interpreted as detriment on the grounds of a proposed activity – *Fitzpatrick v British Railways Board*.[50]

Detriment must be by the employer

The statutory protection also only covers detriment by the employer and not by any other person, eg another company participating in the pension scheme.

- In practice, it is most likely that an employee would complain about detrimental actions being taken by his or her employer rather than by (say) a parent company that was acting as principal employer under the pension scheme (and so having powers under the pension scheme).
- In practice, the most obvious detriments would tend to be by an employer against an individual as an employee rather than in some other capacity. However, a detrimental action could conceivably be taken by the principal employer under a pension scheme power, eg refusing pension increases to individual trustees. This would seem potentially to be outside the s 46 protection on the basis that it is not a detriment actually applied by the employer.[51]

50 [1991] IRLR 376, CA. This was a decision on the equivalent case of trade union activity. See para [193] in Division DII (Detriment) of *Harvey on Industrial Relations and Employment Law* (Lexis Nexis).

51 However, arguments could, depending on the facts, perhaps be raised that the principal employer is actually the employer, or is acting as the agent of the employer. A somewhat similar issue arose in the various judgments in *IBM United Kingdom Holdings Ltd v Dalgleish* [2014] EWHC 980 (Ch), [2014] PLR 335 where the holding company exercised various powers under the pension scheme but a subsidiary (also a party to the litigation) was the actual employer. Warren J held that the exercise of the powers was invalidated by being in breach of the 'Imperial' duty – the implied duty of mutual trust and confidence. A later judgment [2015] EWHC 389 (Ch) dealt with the remedies flowing from the breach, but the employment position was only noticed at the time of that later judgment. This was the subject of a further judgment: [2015] EWHC 1385 (Ch).

- The normal attribution rules would seem to apply to identify an act of the employer for this purpose, eg acts of its directors or agents.
- The employer is not vicariously liable for acts of another employee. In *Fecitt v NHS Manchester*[52] (a protected disclosure case) the Court of Appeal held that victimisation by fellow employees was not within the no detriment provision then in ERA 1996.[53] Potentially the employee/trustee could suffer detriment if the employer did not take appropriate steps to reduce the risk of detriment from third parties?
- Conceivably, detriment could flow from a third party, eg the Pensions Regulator or the members (eg suing the employee/trustee or refusing to re-elect the employee as a trustee). These are not actions of the employer nor even ones under its reasonable control and so seem highly unlikely to be covered by the ERA 1996 protections.[54]

Section 46 only covers detriment on the grounds of the employee performing 'any functions as such a trustee'. However, the use of the plural here probably would still allow the section to apply if the detriment related only to one exercise of a function by the employee. Either the plural would be treated as including the singular[55] or any relevant detriment could be considered as potentially relating to future performances of the relevant functions.[56]

Section 46 does not apply to any detriment suffered by an employee/trustee if the detriment was not by reason of being a trustee. For example, a detriment applicable to all employees (and not just any who was a trustee) would not be within the section.

There must be a detriment

The term 'detriment' is not defined in ERA 1996. It is however also used in TULRCA 1992 and the Equality Act 2010. In practice it is likely that the term will bear the same meaning for all the relevant ERA 1996 protections and for the purposes of TULRCA and the Equality Act.[57]

Detriment could involve dismissal, but also covers other disadvantages that the employee/trustee may suffer.[58]

It is likely that detriment means no more than suffering a disadvantage as compared with the position had the relevant act or omission not occurred (or had occurred to a comparable employee).[59]

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52 [2011] EWCA Civ 1190, [2012] IRLR 64, CA (at [33] per Elias LJ), overruling *Cumbria County Council v Carlisle-Morgan* [2007] IRLR 314, EAT.

53 The no detriment provisions on whistleblowing (protected disclosure) in ERA 1999, s 47B have since been amended to provide for a direct liability on a fellow employee (and so hence on the employer) for any detriment done by a fellow employee or an agent of the employer: s 47B(1A) and (1B), inserted from June 2013 by the Enterprise and Regulatory Reform Act 2013. But this change only applies to s 47B and protected disclosure, so the decision in *Fecitt* remains in force in relation to s 46 and detriment to an employee/trustee.

54 *Burton v De Vere Hotels* [1996] IRLR 696: EAT held that insulting conduct by customers was held to allow a claim against the employer for discrimination, but this was later disapproved by the House of Lords in *Pearce v Governing Body of Mayfield School* [2003] IRLR 512 – see Lord Nicholls at [31].

55 See s 6(c) of the Interpretation Act 1978.

56 See para [194] in Division DII (Detriment) of *Harvey on Industrial Relations and Employment Law* (Lexis Nexis).

57 See *Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] IRLR 677, CA. Note that the EAT considers that it is different to treating someone 'unfavourably' as discrimination on the grounds of disability under s 15 of the Equality Act 2010 – see Langstaff P in *Trustees of Swansea University Pension & Life Assurance Scheme v Williams* UKEAT/0415/14/DM at [27]. The difference between the two concepts seems marginal however.

58 Dismissal is outside the statutory ERA protection in s 46 as it is covered by the enhanced unfair dismissal protections in s 102 of the ERA 1996.

59 See para [15] in Division DII (Detriment) of *Harvey on Industrial Relations and Employment Law* (Lexis Nexis), citing the sex discrimination cases, *Woodward v Abbey National plc* [2006] EWCA Civ 822; [2006] 4 All ER 1209 and *Ministry of Defence v Jeremiah* [1979] 3 All ER 833.

Detriment can include:

- A financial or economic loss or disadvantage; or
- Denying a benefit or advantage given to others, eg an equal opportunity for promotion,[60] only requiring male supervisors to carry out dirty work,[61] an opportunity to work overtime,[62] or non-contractual benefits such as a car[63] or parking permit.[64]

An unjustified sense of grievance cannot amount to 'detriment' – *Barclays Bank plc v Kapur (No 2)*.[65]

The test is likely to be the same as for discrimination, ie to show that a reasonable employee would or might take the view that they had been disadvantaged – *Shamoon v Chief Constable of the Royal Ulster Constabulary*[66] (a sex discrimination case).

Could an employer removing an employee from his or her position as a trustee be a detriment within s 46?[67] This seems unlikely to qualify on its own as a detriment on the basis that the role of being a trustee (or director) is usually seen as an onerous obligation[68] and so ceasing to be a trustee could be seen to be a benefit rather than a detriment. But the position could potentially differ if:

- (say) the employee could argue that the cessation meant a reduced status for the employee; or
- the role of trustee was separately remunerated for acting as trustee (and so the employee would cease to have the opportunity to be paid such remuneration in the future).

But even if detriment was shown, the level of any compensation awarded would be likely to be relatively small in such cases.

It is possible that there could be a detriment but that it is justifiable in some way. For example if an employee/trustee committed a fraud[69] while acting as a trustee, it would usually be justifiable for the employer to dismiss the employee (covered by the unfair dismissal provisions in Pt X of ERA 1996 – see below[70]) or to take steps short of dismissal against the employee.[71] At the very least, the fault of the employee is likely to result in any compensation ordered by a tribunal being reduced (potentially to zero) on the grounds that the employee has caused or contributed to the employer's act or omission – s 49(5).

60 *Gallacher v Department of Transport* [1994] IRLR 231, [1994] ICR 967, CA (trade union activities).
61 *Ministry of Defence v Jeremiah* [1980] QB 87, CA.
62 *Clymo v Wandsworth London Borough Council* [1989] IRLR 241, [1989] ICR 250, EAT (sex discrimination).
63 *Ibid*.
64 *Carlson v Post Office* [1981] IRLR 158, [1981] ICR 343, EAT (union membership).
65 [1995] IRLR 87, approved in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] 2 All ER 26, HL, per Lord Hope at [35].
66 *Ibid* at [34] and [35].
67 The relevant arrangements for an MNT or MND must provide that an MNT or MND may only be removed as a trustee (or director of a trustee company) if all the other MNTs (or MNDs) agree – ss 241(6) and 242(6) of the Pensions Act 2004. These arrangements override any conflicting scheme provisions and any conflicting provisions in the articles of association of a trustee company: ss 306(2)(j) and 306(4) of the Pensions Act 2004.
68 See eg Lord Hardwick in *Knight v Earl of Plymouth* (1747) 21 ER 214, (1747) Dick 120 at 126: 'a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety. It is an act of great kindness in anyone to accept it' and more recently Briggs J in *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32 at [56]: 'an arduous unpaid office' (dealing with a family trust).
69 It may be possible to argue that a fraudulent act by a trustee is outside his or her role as a trustee so that he or she is not within the ERA protections.
70 The unfair dismissal provisions in Pt X will allow an employer to seek to justify a dismissal on these grounds – see below.

Detriment must be caused by an act or deliberate failure to act by the employer

Usually it will be clear if any detriment flows from an act of the employer (the usual rules on attributing acts of directors or managers to the employer will apply). There is no vicarious liability for acts of another employee – *Fecitt v NHS Manchester*[72]).

The requirement that an employer's failure to act must be deliberate, probably requires that a conscious decision was made by the employer.[73] Mere indecision is unlikely to be enough. Although the term 'act' is generally defined in s 235(1) of ERA 1996 to include omissions, this only applies 'except in so far as the context otherwise requires'. In practice, given that s 46 expressly refers to a 'deliberate failure to act', the general definition seems not to apply.

Aside from a detriment being shown, it must also be show that it was 'done on the ground that' the employee is acting as a trustee. So there must be a causal link between the detriment and the employee's actions as a trustee.

This means that the reason for the employer's act or omission is relevant:

- This involves deciding on the reason for the act or omission, not the reason for the detriment – see *Bolton School v Evans*,[74] a protected disclosure case[75] where the Court of Appeal held that the treatment of the employee related to his misconduct (breaking into a computer system) and not to the fact that he had made a protected disclosure (about the defects in security).
- The employer's motive behind the detriment is probably not relevant see *Grieg v Community Industry*[76] (a sex discrimination case, no defence to a discrimination claim that the discrimination was allegedly for the victim's own benefit).
- It also probably does not matter that the employer did not intend to subject the employee/trustee to any detriment – see *Birmingham City Council v Equal Opportunities Commission*,[77] and *James v Eastleigh Borough Council*.[78]

Harvey[79] considers:

'The correct approach, it is submitted, is to ask:

- first, whether the employer has in fact treated the complainant differently (from an actual or hypothetical comparator);
- second, whether the reason for that different treatment was the employee's protected act or status (was he treated differently because he was a zealous safety representative or because he made a protected disclosure or as the case may be?); and

71 Eg seeking to recoup any losses by exercising a charge over, or forfeiture of, the trustee's benefits under the scheme. Such a charge or forfeiture is allowed by ss 91(5)(e) and (f) and s 93 of the Pensions Act 1995. It would be odd if one part of the 1995 Act allows such actions, but another part (now in ERA 1996) penalises them.

72 [2011] EWCA Civ 1190, [2012] IRLR 64, CA (at [33] per Elias LJ), overruling *Cumbria County Council v Carlisle-Morgan* [2007] IRLR 314, EAT.

73 Section 48(4)(b) dealing with time limits for claims refers to a deliberate failure to act as being treated as done 'when it was decided upon'. See paras [27] and [28] in Division DII (Detriment) of *Harvey on Industrial Relations and Employment Law* (Lexis Nexis).

74 [2007] IRLR 140, [2007] ICR 641, CA. See also *Martin v Devonshires Solicitors* [2011] ICR 352, EAT and *Panayiotou v Kernaghan* [2014] IRLR 500, EAT.

75 Section 47B(1) of the ERA 1996.

76 [1979] IRLR 158, [1979] ICR 356, EAT.

77 [1989] AC 1155, HL.

78 [1990] AC 751, HL.

79 Para [33] in Division DII (Detriment) of *Harvey on Industrial Relations and Employment Law* (Lexis Nexis).

- third, whether that different treatment did in fact result in a detriment to the employee, intended or unintended, foreseen or unforeseen.

If the answer to all three questions is ''yes'', then the employee has a legitimate complaint.'

Onus of proof

If a complaint is brought, it is for the employer to show the ground on which any act, or deliberate failure to act, was done – s 48(2) of ERA 1996. This means that the statutory burden is on the employer to show that the act or deliberate failure complained of was not on the grounds that the employee was acting as a pension trustee (using a balance of probabilities test).

In effect, the tribunal would look to see whether acting as a pension trustee did or did not materially influence the employer's treatment of the employee. A trivial influence is unlikely to be enough – *Fecitt v NHS Manchester*.[80]

A direct analogy cannot be made with the discrimination law provisions,[81] which require a finding if the employer fails to convince the tribunal of its version of events – *Kuzel v Roche Products Ltd*[82] and *Serco Ltd v Dahou*.[83]

Claims before the employment tribunal

An employee's remedy for breach of s 46 is by way of complaint to employment tribunal for declaration and appropriate money compensation (if relevant) – ss 48 and 49 of ERA 1996.

The remedy for a statutory detriment claim is only by way of complaint to the employment tribunal – s 48(1) of ERA 1996.

This is because ERA 1996, s 295 provides that claims cannot be brought for infringement of any of the rights in:

- Pt V (Protection from suffering detriment in employment), which includes s 46;
- Pt VI (Time off work), which includes ss 58 to 60; or
- Pt X (Unfair dismissal) of ERA 1996,

save by a complaint or reference to an employment tribunal – s 295(1) of ERA 1996.

This means that a claim for breach of the ERA 1996 protections for trustees could not be made before the Pensions Ombudsman or a court.

This provision, that breach of s 46 can only be heard before the employment tribunal, means that it is highly unlikely that there would be considered to be a separate implied contractual right just based on the statutory provision – see, eg *Fosca Services (UK) v Birkett*[84] (an unfair dismissal case). Similarly no claim can be made against a third party (eg a director or parent company) for inducing a breach of the statutory prohibition – *Wilson v Housing Corporation*[85] (also a claim based on unfair dismissal).

80 [2012] IRLR 64, CA, a case on protected disclosure.
81 Now the no detriment duty under s 39(2)(d) of the Equality Act 2010, with the onus resting on the employer under s 136 of the Equality Act 2010.
82 [2008] IRLR 530, CA at [48]. The Court of Appeal pointed out that the relevant detriment section (here s 48(2)) only requires that the tribunal may draw an adverse inference.
83 [2015] IRLR 30, EAT, a case on detriment on trade union grounds that uses similar wording.
84 [1996] IRLR 325, EAT.
85 [1998] ICR 151 (Dyson J).

Having said that, it is possible that another common law or statutory claim could arise out of the same facts as involve a breach of the ERA 1996 statutory protections discussed here – for example a breach of contract claim may be possible on the basis that a relevant act was not only a detriment (within s 46), but also constituted a breach of the implied mutual duty of trust and confidence.[86]

Claims must be brought within three months beginning with the date of the act or failure to act upon which the complaint is based – s 48(3). If the act or failure is part of the series of similar act or failures then within the three months runs from the date the last – s 48(3)(a). The tribunal has a discretion to extend the period by such further time as it considers reasonable where 'it is satisfied it is not reasonably practicable for the complaint to be presented before the end of that period of 3 months' – s 48(3)(b).

The relevant three-month time period can be extended because of mediation in certain European cross-border disputes – s 48(4A), applying s 207A(3) and 207B[87] of ERA 1996.

Compensation

If a complaint is found to be well-founded:

- the tribunal must make a declaration to the effect that statutory unlawful detriment has been found – s 49(1)(a) of the ERA 1996; and
- the tribunal may also award compensation – s 49(1)(b) of the ERA 1996.

If the tribunal finds the complaint well founded then it has to make a declaration to that effect, but has a discretion to make an award of compensation.

The amount of compensation is decided by the tribunal as the amount it considers 'just and equitable in normal circumstances'. The tribunal has to have regard to:

- the infringement to which the complaint relates; and
- any loss which is attributable to the act, or failure to act – s 49(2).

Loss includes expenses and loss of benefit – s 49(3). The complainant is under a duty to mitigate his loss in the same way as in common law – s 49(4).

The amount of compensation can be reduced if the tribunal finds that the relevant act or failure to act was 'to an extent caused or contributed to by action of the complainant' – s 49(5).

The Employment Appeal Tribunal (EAT) has held that a damages award can include

86 See *Malik v BCCI* [1997] 3 All ER 462, HL. *Harvey* gives the example of the decision in *British Aircraft Corpn Ltd v Austin* [1978] IRLR 332 where the EAT held that the failure to investigate health and safety complaints amounted to a repudiatory breach of the contract of employment entitling the employee to resign and bring a complaint of constructive dismissal. Harvey goes on to note 'However it needs to be recognised that not every breach of the employment legislation will result in a corresponding breach of the employment contract.' – Section DII.[4].
For a recent example (in the pensions context) of a common law claim arising, see *IBM Holdings v Dalgleish* [2014] EWHC 980 (Ch) at [1553] where Warren J held that a claim could arise for failure to comply with consultation obligations under legislation, despite the legislation stating that the only remedy for a failure to comply was by way of action by the Pensions Regulator. Further discussed in the remedies hearing [2015] EWHC 389 (Ch) at [662].

87 As inserted by regs 30 and 34 of the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133) as from 20 May 2011, and as amended by the Enterprise and Regulatory Reform Act 2013 as from 6 April 2014. This allow for mediation as envisaged under the EU Mediation Directive (2008/52/EC).

awards for injury to feelings and aggravated damages or exemplary damages – see *Virgo Fidelis Senior School v Boyle*[88] and *Commissioner of Police for the Metropolis v Shaw*.[89]

Harvey[90] comments that as damages for injury to feelings cannot be awarded for unfair dismissal, a line may have to be drawn where the detriment turns into a dismissal. Where the employee subject to the detriment leaves employment and claims constructive dismissal, damages for injury to feelings may be awarded up to the date the employee left and the employment terminated: *Melia v Magna Kansei Ltd*.[91]

Unfair dismissal - s102, ERA 1996

Section 102 of ERA 1996 was introduced with effect from 6 October 1996 by the Pensions Act 1995. It gives further protection for employees acting as trustees (or directors of corporate trustees) of a relevant occupational pension scheme, where they are dismissed because of acting as such a trustee.

Section 102 is in Pt X (Unfair dismissal) of ERA 1996 and states:

> '102 Trustees of occupational pension schemes
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that, being a trustee of a relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.
> (1A) This section applies to an employee who is a director of a company which is a trustee of a relevant occupational pension scheme as it applies to an employee who is a trustee of such a scheme (references to such a trustee being read for this purpose as references to such a director).
> (2) In this section ''relevant occupational pension scheme'' means an occupational pension scheme (as defined in section 1 of the Pension Schemes Act 1993) established under a trust.'

As for the 'no detriment' protection under s 46, the protection in s 102 again only applies to a relevant occupational pension scheme, that is one which relates to the employer of the individual employee (see above).

Section 102 provides that if the reason for an employee's dismissal (or, there is more than one reason, the principal reason) is because 'the employee performed (or proposed to perform) any function as such a trustee' then the dismissal is regarded as an unfair dismissal for the purposes of Pt X of ERA 1996.

In addition, the usual qualifying period for an employee to be able to bring an unfair dismissal claim (currently two years' continuous service) does not apply where s 102 applies.[92]

If any dismissal is during the first two years' of the employee's continuous service, the burden of proof in showing that any dismissal related to performance of trustee duties is on the employer. After this, the onus is on the employee to show the reason for the dismissal:

88 [2004] IRLR 268, EAT.
89 [2012] IRLR 291, EAT.
90 *Harvey on Industrial Relations and Employment Law* (Lexis Nexis).
91 [2005] EWCA Civ 1547, [2006] IRLR 117, CA.
92 See s 108(3)(e) of ERA 1996. The two-year period is in s 108(1).

Smith v Hayle Town Council[93] and *Maund v Penwith District Council*.[94] This is slightly odd in that the onus of proof in detriment cases (under s 46) is on the employer to show the reason (s 48(2) and see above), but s 46 does not extend to dismissal claims under Pt X (see s 46(2)).

The usual time limits for bringing claims and monetary caps on claims brought for unfair dismissal apply to claims under s 102.

Similar protections apply for other posts, eg trade union activities,[95] jury service, health and safety activities etc. There is a similar protection for dismissal relating to trade union activities,[96] but, unlike the s 102 protection for employee trustees (where the trustee role must relate to a scheme of the employer), the trade union protection probably extends to cover trade union activities for a former employer – *Fitzpatrick v British Railways Board*.[97]

It is possible that there could be a dismissal in circumstances where it would ordinarily be considered fair or justifiable in some way. For example if an employee/trustee committed a fraud while acting as a trustee,[98] it would often be justifiable for the employer to dismiss the employee. At the very least, the fault of the employee is likely to result in any compensation ordered by a tribunal being reduced (potentially to zero) on the grounds that the employee has caused or contributed to the dismissal – ERA 1996, s 123. There seems to be no reason why such a deduction could not apply even though the dismisal is deemed (under s 102) automatically to be unfair so that the potential defence for the employer (of showing that the dismissal was fair – ERA 1996, s 86) does not apply.

Time off for employee trustees – ss 58 and 59 of ERA 1996

Sections 58 to 60 of the Employment Rights Act 1996[99] give general protections including rights to time off to employees who are trustees (or directors of a corporate trustee) of a relevant occupational pension scheme.

These rights include:

- a right to time off for such trustees to perform their duties – s 58; and
- right to payment for time off under s 58 – s 59.

The obligations only apply to the 'employer in relation to a relevant occupational pension scheme'. The definition here is slightly different from those applicable under ss 46 and 102 (see above), as s 58(3) goes on to define an employer in relation to a relevant occupational pension scheme as being 'an employer of persons in the description or category of[100] employment which the scheme relates'.

This tracks the definition in 'employer' used generally in the pensions legislation, in particular the Pensions Act 1995 and the Pensions Act 2004. Such definition can give rise to

93 [1978] ICR 996, CA.
94 [1984] ICR 143, CA. See also *Kuzel v Roche Products Limited* [2008] EWCA Civ 380, [2008] IRLR 530, CA.
95 Section 152(1) of TULRCA 1992.
96 *Ibid*.
97 [1991] IRLR 376, CA. See the discussion in *Harvey* at Division N1.4.c.(8)(h).
98 It may be possible to argue that a fraudulent act by a trustee is outside his or her role as a trustee so that he or she is not within the protections.
99 Originally ss 42 to 46 of the Pensions Act 1995.
100 The words 'or category' are to be deleted by the Pensions Act 2004, s 320 from a day to be appointed. Nothing seems to turn on this: see Warren J in the Marine Pilots case, *PNPF Trust Co Ltd v Taylor* [2010] EWHC 1573 (Ch), [2010] All ER (D) 251 (Jun) at [462].

significant issues in working out who exactly is an 'employer' in relation to a pension scheme.[101]

Sections 58 and 59 also apply to directors of a company which is acting as a trustee of a relevant occupational pension scheme. As in relation to s 46, the rights under ss 58 and 59 do not apply to trustees of schemes which do not relate to their employer, nor to persons who are potential trustees (eg candidates for an election or selection as MNTs).

Section 59 gives an employee the right to payment for time off on the basis of the employee being 'paid as if he had worked at that work for the whole of that time' – s 59(2). There are provisions for 'average hourly earnings' to apply where the employee's remuneration varies with the amount of work done – s 59(3) and (4).

The right to be paid under s 59 does not affect the right of employee to remuneration under his contract of employment – s 59(5). The amount paid goes towards discharging any liability of the employer under the contract of employment and vice versa – s 59(6).

The employee can bring a complaint to an employment tribunal in relation to any failure to allow him to take time off or to pay him under s 59 – s 60. Complaints need to be brought within three months of the relevant failure (unless the tribunal is satisfied this was not reasonably practicable to be presented before the end of that time). Broadly the same issues arise as under s 46 (see above).

If the complaint is upheld, then the tribunal will make a declaration and can make an award of compensation on similar basis to that under the detriment protection in s 46 (noted above).

Time off for performance of duties and for training: s 58

The amount of time off, the purpose for which time off is taken, the occasion when time off is taken and any conditions on time off imposed by the employer must all be reasonable in all the circumstances – s 58(2). What is reasonable is a question of fact to be determined by looking at all the circumstances and in particular the factors set out in ss 58(2)(a) and (b):

- how much time off is required for the performance of the duties of a trustee of the particular scheme and receiving the relevant training;
- how much time off is required for the performance of a particular duty in question or, if relevant, receiving particular training; and
- the circumstances of the employer's business and the effect of the employee's absence on the running of the business.

An employee's working hours means the hours which he or she is required to work under his or her contract of employment – s 58(4).

In practice, determining what is reasonable from the words of s 58 is likely to leave some scope for debate. Guidance is likely to be drawn from parallel legislation:

101 See the pensions cases on broadly equivalent definitional wording (although the pensions legislation goes on, in many cases, to deal expressly with former employers and frozen schemes): *Hearn v Dobson* [2008] EWHC 160 (Ch) (Morgan J); *Cemex UK Marine Limited v MNOPF Trustees Limited* [2009] EWHC 3258 (Ch) (Peter Smith J); and *PNPF Trust Co Ltd v Taylor* [2010] EWHC 1573 (Ch) (Warren J). Discussed in 'Who is the Employer', Chapter 2.4 in *Freshfields on Corporate Pensions Law 2015* (Bloomsbury Professional).

- *Trade union duties*: trade union officials are allowed paid reasonable time off to train for and perform defined union activities under the statute – ss 168 to 173 of TULRCA 1992.
  For example, in *London Ambulance Service v Charlton*[102] the EAT held that trade union officials were entitled to paid time off for preparations for negotiations in connection with collective bargaining, and in *Ryford Ltd v Drinkwater*[103] the EAT held that an employer is not in breach of his duty to allow time off if a request has not been received by the employer. Similarly if the employer is not fully aware of the scope of the training: *Ministry of Defence v Crook and Irving*.[104]
  The TULRCA 1992 provisions are supplemented by an ACAS Code of Practice No 3: 'Time off for trade union duties and activities'.[105]
- *Public duties*: employees have a right to reasonable time off to perform various public duties (eg a justice of the peace, member of a local authority, etc) – s 50 of ERA 1996. There is no right to pay during the time off (nor to time off for training).
- *Health and safety*: employees who are safety representatives have a right to time off with pay to perform their duties as safety representatives and to receive training in health and safety matters – the Safety Representatives and Safety Committees Regulations 1977.[106]

What is reasonable in the circumstances may depend on what the tribunal objectively considers to be reasonable (and not on a 'range of reasonable responses test as applies for unfair dismissal). Contrast the public duties case under s 50 of ERA 1996, *Riley-Williams v Argos Ltd*[107] with the TULRCA case, *Ministry of Defence v Crook and Irving*.[108]

Calculation of payment for time off: s 59

Under s 59 (which is in effect the same as s 169 of TULRCA 1992) an employee is entitled to payment for time off for training or performance of his trustee duties as follows:

- the employee's remuneration for the whole of the time he would have worked had he not had time off where his remuneration does not vary with the amount of work done – s 59(2); or
- the employee's average hourly earnings for the work done where his remuneration does vary with the amount of work done – s 59(3).

Average hourly earnings means the average earnings of the employee in question or, if this cannot be fairly estimated, then the average hourly earnings for the work in question of persons in comparable employment. If there is no-one in comparable employment then 'a

102 [1992] ICR 773, EAT.
103 EAT 723/94, 24 May 1995, IDS Brief 550.
104 [1982] IRLR 488, EAT.
105 www.acas.org.uk/media/pdf/n/k/Acas_Code_of_Practice_Part-3-accessible-version-July-2011.pdf.
106 SI 1977/500, as amended. Similarly representatives elected for the purposes of consultation with employers have rights to paid time off: Health and Safety (Consultation with Employers) Regulations 1996 (SI 1996/1513). The Health and Safety Commission has issued a Code of Practice, L146 'Consulting workers on health and safety' (Second edition with amendments, published 2014) – see www.hse.gov.uk/pubns/priced/l146.pdf.
107 EAT/821/02, [2003] All ER (D) 58 (Jul), EAT.
108 [1982] IRLR 488, EAT See *Harvey* at CII.4.C(2).

figure of average hourly earnings which is reasonable in the circumstances' applies – s 59(4).[109]

Any payment under s 59 is treated as discharging the employer's liability to pay the employee his remuneration under his contract of employment – s 59(5).

Remedies for employer default: s 60

An employee may complain to an employment tribunal in respect of an employer's failure to grant time off or to pay the employee for time off granted: s 60(1). On time limits, the position is the same as under the detriment provisions in s 46 – see above.

If the tribunal finds the complaint for failure to grant time off well founded, the tribunal must make a declaration that time off should have been granted. The tribunal then has discretion to make an award for compensation of an amount it considers just and equitable to be paid by the employer to the employee.[110] The tribunal must have regard in making an award to both the employer's default and the employee's loss attributable to the matters complained of to the tribunal – s 60(4).

If an employer fails to pay the amount due under s 59, the tribunal must order him to pay the amount which it finds due – s 60(5).

It is likely that compensation can be awarded by the tribunal even though no monetary loss has been suffered by the employee, eg for injury to feelings. But any award is not penal – *Skiggs v South West Trains Ltd*[111] (a case on compensation for refusal of time off for union duties).

As for the detriment protections under s 46, there is no remedy for infringement of ss 58 or 59 other than by complaint to an the employment tribunal is available – s 295(1) of ERA 1996.

It seems that the employment tribunal does not have the power to impose conditions on the employer or employee as to the way in which the time off will be granted or to specify the amount of time off which should be allowed – *Corner v Buckinghamshire County Council*,[112] (a case on the relevant provisions in the predecessor of ERA 1996[113] on the right to time off for public duties).

The rights are not subject to the employee/trustee having a minimum level of continuous service with the employer.

109 *Harvey* points out at CII.4.C(3), that s59 does not, unlike equivalent sections, set out the period over which any average is to be taken.

110 *Harvey* comments (on the equivalent TULRCA provision) that this formulation, neither purely penal or compensatory, is wide enough to allow a reasonable and proportionate award for the wrong done to union officer or member, even if no actual financial loss can be shown – *Skiggs v South West Trains Ltd* [2005] IRLR 459, EAT.

111 [2005] IRLR 459, EAT.

112 [1978] ICR 836, EAT.

113 The Employment Protection (Consolidation) Act 1978.