These notes refer to the Employment Act 2008 (c.24)
which received Royal Assent on 13 November 2008

EMPLOYMENT ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Dispute resolution

Section 1: Statutory dispute resolution procedures

13. EA 2002 provides, in sections 29 to 33 and Schedules 2 to 4, for statutory workplace dispute resolution procedures (referred to in these notes as "the Statutory procedures").

14. The Statutory procedures came into force in October 2004 and introduced mandatory "three step processes" to be followed in the workplace to handle disciplinary and dismissal matters raised by an employer, and grievances raised by an employee. These processes each require written notification of the issue to the other side, a meeting between the two sides and (if appropriate) an appeal. Additionally, where the employer or the employee respectively fails to use the minimum Statutory procedures, section 31 of EA 2002 requires a tribunal to increase or decrease any award.

15. When the procedures were introduced, the Government undertook to review their operation and impact after two years. The independent Gibbons Review *["A Review of Employment Dispute Resolution in Great Britain", DTI March 2007 URN 07/755]* concluded that the Statutory procedures, whilst right in principle, have as a result of their mandatory nature led to unforeseen consequences. In particular, they have tended to lead to disputes becoming formalised, and lawyers getting involved, at an earlier stage than had previously been the case. Following a full public consultation *["Resolving Disputes in the Workplace", DTI March 2007 URN 07/734]*, the Government has decided to repeal the Statutory procedures.

16. Section 1 therefore repeals sections 29 to 33 and Schedules 2 to 4 to EA 2002, thus removing the Statutory procedures in their entirety.

Section 2: Procedural fairness

17. Prior to 2004, the handling of breaches of procedure in unfair dismissal cases was based on case law, and in particular the House of Lords judgment in *Polkey v A E Dayton Services Ltd* [1988] AC 344, which provided that a dismissal could be unfair purely on procedural grounds, but that in those circumstances the tribunal should reduce or eliminate the compensation payable (other than the basic award) to reflect the likelihood (if any) that the dismissal would have gone ahead anyway if the correct procedures had been followed. At the same time as the Statutory procedures were introduced in 2004, a new section 98A was inserted into ERA 1996. This section provides that a dismissal where an employer does not complete the Statutory procedures is automatically unfair. It also provides that a tribunal may disregard any failure by the employer to comply with other (e.g. workplace based) procedures in respect of the dismissal, if following such other procedures would have had no effect on the decision to dismiss.

18. Following the public consultation, the Government has decided to repeal section 98A of ERA 1996 in its entirety, so as to revert to the situation which applied previously based on the *Polkey* line of cases.

Section 3: Non-compliance with statutory Codes of Practice

19. As noted in paragraph 14, section 31 of EA 2002 requires a tribunal to increase or decrease any award where an employer or employee fails to follow the Statutory procedures. Section 31 of EA 2002 is repealed by section 1 of this Act and section 3 provides for an alternative mechanism to encourage compliance with a relevant Code of Practice which relates exclusively or primarily to procedure for the resolution of disputes issued under the power described below.

20. Under Part IV, chapter 3 of TULRCA 1992, the Secretary of State and Acas may issue Codes of Practice subject to Parliamentary approval ("statutory codes"). Section 207 of TULRCA 1992 provides that a statutory code, although not legally binding, is admissible in evidence and can be taken into account by the employment tribunal.

21. In order to provide an incentive to follow recommended practice, section 3 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution, by introducing a new section 207A and Schedule A2 to TULRCA 1992. The relevant Code of Practice is one which relates exclusively or primarily to procedure for the resolution of disputes. Of the existing six codes issued under TULRCA, such a definition only applies to the Acas Code of Practice on disciplinary and grievance procedures, which Acas is substantially revising for reissue at the time the Act comes into force.

22. Subsection (2) of new section 207A provides that the employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the relevant Code of Practice.

23. Subsection (3) of new section 207A provides that the employment tribunal may, if it considers it just and equitable, decrease any award to an employee by no more than 25% if it appears to the tribunal that the employee has unreasonably failed to comply with the relevant Code of Practice.

24. Subsection (5) of new section 207A provides that, where an award is adjusted under new section 207A and also under section 38 of EA 2002 (which provides that awards for claims under specified jurisdictions must be adjusted where it transpires during those proceedings that the employer has failed to give the statutory statement of employment particulars) the adjustment under new section 207A is to be made first.

25. New Schedule A2 lists the jurisdictions covered by this section. Together, the listed jurisdictions cover the overwhelming majority of tribunal claims. Subsection (6) of new section 207A confers power on the Secretary of State to add or remove jurisdictions from the list.

Section 4: Determination of proceedings without hearing

26. Section 7(3A) of ETA 1996 provides that employment tribunals may be authorised to decide cases without any hearing. Although this wide power was inserted into ETA 1996 in 2002, it has not been used. All cases in the employment tribunal are currently decided at a hearing before a full tribunal panel or a chairman sitting alone.

27. Section 4 inserts a new section 7(3AA) and 7(3AB) into the ETA 1996 to specify that employment tribunal procedure for determinations without hearing must ensure that all parties to the proceedings consent in writing to the process. The section also ensures that tribunals may continue to issue default judgments without a hearing, and that the consent of parties is not required in these circumstances.

Section 5: Conciliation before bringing of proceedings

28. Section 5 inserts amendments to section 18 of ETA 1996, which provides for the circumstances in which Acas is obliged, or has the power, to offer conciliation.

29. Section 18(3) of ETA 1996 applies to conciliation in situations where a person claims he could bring tribunal proceedings, but has not yet done so. It provides that where either the person who might bring proceedings, or the employer against whom proceedings might be brought, has requested conciliation, the Acas conciliation officer has a duty to attempt to conciliate a solution to the dispute (where both parties have made the request), or (if only one party has made the request) to do so where he considers there is a reasonable prospect of success. *Subsection (2)* amends section 18(3) to replace this obligation with a discretionary power to conciliate in a pre-tribunal dispute without requiring the Acas officer to justify the reasons for his decision whether or not to offer conciliation. The intention of the amendment is to enable Acas to prioritise cases where demand for conciliation exceeds resources available for conciliation and to relieve Acas of the obligation to offer conciliation in pre-tribunal disputes where there is no prospect of success.

30. Section 18(5) of ETA 1996 provides that, where a person claims that an unfair dismissal complaint under section 111 of ERA 1996 could be, but has not yet been, made, the Acas officer must act as if that claim had been made and, as provided for in section 18(4) of ERA 1996, as part of the conciliation exercise, attempt to secure reinstatement or reengagement (or additional compensation in lieu of such) for the dismissed employee. *Subsection (3)* repeals that duty and substitutes a discretionary power to seek such reinstatement or reengagement in pre-tribunal disputes.

Section 6: Conciliation after bringing of proceedings

31. Section 18(2A) of ETA 1996 requires that, where employment tribunal rules provide for the postponement of employment tribunal hearings for a fixed period, to allow an opportunity for conciliation and settlement, Acas's duty to conciliate continues during that postponement but then becomes a discretionary power.

32. Section 19(2) of ETA 1996 requires additionally that, where employment tribunal rules provide as set out in section 18(2A), those rules must also provide that the parties be notified of the possibility that conciliation services may be withdrawn after expiry of the postponement.

33. The Gibbons Review of the Statutory procedures, confirmed by the responses to the government consultation, concluded that disputes were not generally being settled earlier, despite the parties' knowledge that after the expiry of the fixed conciliation period Acas would not be required to offer assistance in reaching a settlement.

34. Section 6 repeals section 18(2A) and 19(2) of ETA 1996, with the effect that Acas's duty to conciliate in employment tribunal cases subsists throughout the proceedings until the tribunal delivers a judgment.

Section 7: Compensation for financial loss

35. Section 7 amends ERA 1996 so as to give employment tribunals the power to order employers to compensate workers for any financial loss sustained as a result of unlawful deduction from wages or payments made to the employer in contravention of sections 15 and 21(1) of ERA 1996, or non-payment of redundancy awards.

Unlawful deduction from or unauthorised payment of wages

36. Sections 13(1) and 15(1) of ERA 1996 provide that an employer may not make unauthorised deductions from a worker's wages and sections 18(1) and 21(1) of ERA 1996 provide for limits to authorised deductions. Where any of these provisions are

contravened, a worker has a right to remedy by way of complaint to an employment tribunal under section 23(1) of ERA 1996.

37. Section 24 of ERA 1996 provides that, where an employment tribunal finds a complaint made under section 23(1) to be well founded, it will make a declaration to that effect and order the employer to pay or as the case may be repay the worker the amount of the deduction or payment.

38. The remedies available in sections 23 and 24 of ERA 1996 do not, however, extend to compensation for losses arising out of the non-payment or unauthorised deduction or payment, for example additional bank charges or interest charges. It is possible for a separate claim for such losses to be made by workers who are no longer employed by the defaulting employer, but only in the county court as part of an action for breach of contract by means of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994[1] or its equivalent in Scotland[2].

39. Section 7 inserts a new provision into ERA 1996 (new section 24(2)) so as to empower employment tribunals to order an employer to make, in addition to the payment (or repayment) of the amount of the unauthorised deduction or payment, a compensatory payment to reflect any financial loss suffered by the worker as a result of the employer's default. The tribunal would calculate any such amount so as to be appropriate in all the circumstances. This is intended to enable workers to be fully compensated for their losses, and simplify the process of recovery for those whose employment relationship has ended by removing the need to make a separate county court claim.

Non-payment of redundancy payments

40. Section 163 of ERA 1996 provides that any questions relating to the right of an employee to a redundancy payment or the amount of the redundancy payment shall be referred to and determined by an employment tribunal.

41. Section 7 inserts a new subsection (5) to section 163 of ERA 1996 which provides that, where an employment tribunal determines that an employee has a right to a redundancy payment, the tribunal can order that an additional payment be made to compensate the worker for any financial loss attributable to the non-payment of the redundancy payment.

National Minimum Wage

42. Under NMWA 1998, all qualifying workers are entitled to be paid at least the rate of the NMW, as set by regulations made by the Secretary of State. Section 13 allows the Secretary of State to appoint officers for the purposes of NMWA 1998, including its enforcement provisions. The Secretary of State has appointed HMRC to enforce the NMW.

43. Over and above the NMW, there are minimum wage rates for agricultural workers. The relevant legislation is: for England and Wales, the Agricultural Wages Act 1948; for Scotland, the Agricultural Wages (Scotland) Act 1949; and for Northern Ireland, the Agricultural Wages (Regulation) (Northern Ireland) Order 1977. This legislation provides that the enforcement mechanisms in NMWA 1998 apply to the enforcement of the AMW under the respective statutes listed. Agricultural wages are devolved matters in respect of Scotland and Northern Ireland.

Section 8: Arrears payable in cases of non-compliance

44. Section 8 amends section 17 of NMWA 1998. The aim of this section is to provide for increased remuneration, above that currently provided for, where arrears of the NMW

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1 (SI 1994/1623)
2 (SI 1994/1624)

have been outstanding over a period of time, to take account of the length of time that arrears have been owing.

45. *Subsections (1) to (5)* together amend section 17 NMWA 1998 so that the arrears to which a worker is entitled under that section are the higher of either: the arrears calculated in accordance with section 17(2); or the arrears calculated in accordance with the methodology set out in section 17(4). The formula in section 17(4) divides the amount of the underpayment (A) by the NMW rate applicable at the time of the underpayment (R1). The amount of the underpayment is thereby converted into a notional period of unpaid time. This notional period is then multiplied by the NMW rate applicable at the time the arrears are determined (R2). If the NMW rate at the time the arrears are determined is higher than the NMW rate in force at the time the worker was underpaid, the worker is entitled to a greater amount which takes account of the length of time he remained unremunerated.

46. Section 17(5) provides that where a worker is paid the full arrears he is entitled to in relation to a pay reference period, he has no further entitlement to arrears in relation to that pay reference period. Section 17(6) provides that where a worker is paid part of the arrears owed under section 17, his entitlement to arrears calculated under either section 17(2) or 17(4) (whichever is greater) shall be reduced by that sum.

47. *Subsection (6)* consequentially amends the formula above for the purposes of its application to the Agricultural Wages Act 1948 to give effect to the provisions as regards that Act.

48. *Subsection (7)* provides that none of the amendments to section 17 shall have effect in respect of the Agricultural Wages (Regulations) (Northern Ireland) Order 1977 and the Agricultural Wages (Scotland) Act 1949. Agricultural wages are devolved matters in respect of Scotland and Northern Ireland.

49. *Subsection (8)* provides that section 17 and its method of calculating arrears shall have effect notwithstanding that the worker's entitlement arose before the commencement date, where a worker has not received full additional remuneration before section 8 comes into force.

Section 9: Notices of underpayment

50. Sections 19 to 22F of NMWA 1998 contain provisions concerning the issuing of enforcement notices and penalty notices. At present, if an officer believes that a worker or workers have not been paid the national minimum wage by an employer, the officer may issue an enforcement notice requiring that the arrears be paid. If the employer fails to comply in full with the enforcement notice within 28 days of its service, the officer has the power to take further action by bringing a case against the employer through the courts or tribunals and/or issuing a penalty notice. A penalty notice imposes a financial penalty on the employer, related to the period of his failure to comply with the enforcement notice. An employer can appeal an enforcement notice and/or a penalty notice to an employment tribunal (in Northern Ireland, to an industrial tribunal).

51. *Subsection (1)* of section 9 inserts new sections 19 to 19H into NMWA 1998 to replace the existing enforcement and penalty notices with a new single notice of underpayment.

Notices of underpayment: arrears

52. New section 19 provides that where an officer is of the opinion that an employer has not paid a worker the national minimum wage, or has not fully repaid any arrears which the worker is entitled to under section 17, the officer may serve a notice of underpayment requiring the employer to pay arrears to the worker or workers named in the notice (subsections (1) and (2)). The notice may require employers to pay arrears relating to periods occurring before the coming into force of new section 19, but arrears relating to

periods more than six years before the date of service of the notice may not be included in the notice (subsections (6) and (7)).

Notices of underpayment: financial penalty

53. New section 19A provides that the notice of underpayment must require the employer to pay a financial penalty to the Secretary of State within 28 days of service of the notice (subsection (1)) unless the Secretary of State has, by directions, specified circumstances in which a penalty is not to be imposed (subsection (2)). The penalty is set at 50% of the total underpayment of the national minimum wage (subsection (4)), although underpayments occurring in periods before the commencement of the provision will not be taken into account when calculating the penalty (subsection (5)). The minimum penalty is £100 and the maximum penalty is £5,000 (subsections (6) and (7)). The Secretary of State has the power to change, by regulations, the percentage used to set the penalty, the minimum and the maximum penalty (subsection (8)). If the employer complies with the notice within 14 days of its service, the financial penalty is reduced by 50% (subsection (10)). The financial penalty shall be paid into the Consolidated Fund (subsection (11)).

Suspension of financial penalty

54. New section 19B allows for the notice of underpayment to contain a provision suspending the requirement to pay a penalty where proceedings have been instituted, or may be instituted against an employer in respect of a criminal offence under section 31. Where a notice contains such a provision, an officer may serve a notice on an employer terminating the suspension where criminal proceedings have either concluded or will not be instituted (subsection (4)). Where an employer has been convicted of an offence under section 31, an officer must serve a notice on the employer withdrawing the financial penalty (subsection (6)).

Notices of underpayment: appeals

55. New section 19C provides that an employer may appeal to an employment tribunal (an industrial tribunal in Northern Ireland) against a notice of underpayment. An employer may successfully appeal on one or more of three main grounds (subsection (1)). The first is that, at the date set out in the notice, no arrears were owing to any worker(s) named in the notice – i.e. that the employer was compliant with the Act (subsection (4)). If the employment tribunal allows an appeal under this ground it must rescind the notice (subsection (7)). The second is that any requirement in the notice to pay a sum to a worker was incorrect; either because no sum was due to that particular worker or that the sum specified in the notice was incorrect (subsection (5)). The third is that either a notice included a penalty in circumstances that have been specified in directions under section 19A(2) or that the amount of the penalty specified in the notice is incorrect (subsection (6)). If the employment tribunal allows an appeal under either the second or third ground it must rectify the notice, in which case the notice has effect as rectified by the tribunal (subsection (8)).

Non-compliance with notice of underpayment: recovery of arrears

56. New section 19D reproduces the current provisions in section 20 of NMWA 1998 which give officers the power to take civil action to recover arrears on behalf of a worker or workers.

Non-compliance with notice of underpayment: recovery of penalty

57. New section 19E reproduces the provision currently in section 21(5) of NMWA 1998.

Withdrawal of notice of underpayment

58. New section 19F allows an officer to withdraw a notice of underpayment by serving notice of withdrawal on the employer where it appears to him that the notice wrongly includes or omits any requirement or is incorrect in any particular (subsection (1)). Where a notice is withdrawn and no replacement notice is issued, any penalty which the employer has already paid in accordance with the withdrawn notice must be repaid with interest (subsections (2)(a) and (4)). Any appeal against the withdrawn notice will be dismissed and an officer may not start subsequent proceedings to recover arrears on behalf of the worker(s) on the basis of the withdrawn notice, although any proceedings started before the notice was withdrawn may be continued (subsections (2)(b), (c) and (d)).

Replacement of notice of underpayment

59. New section 19G allows an officer to issue a replacement notice at the same time that a notice is withdrawn (subsection (1)). The replacement notice cannot include workers who were not contained in the withdrawn notice (subsection (2)). Contravention of this requirement is a ground for appeal by an employer against the notice (subsection (3)). The replacement notice may include arrears incurred after service of the withdrawn notice but before service of the replacement notice (subsection (4)). When a replacement notice is issued, the six years limitation period for including arrears in new section 19(7) is calculated from the date of service of the first notice rather than the date of service of the replacement notice (subsection (5)). The replacement notice must set out the material differences from the withdrawn notice (subsection (6)). An officer will only be able to issue one replacement notice (subsection (8)).

Effect of replacement notice of underpayment

60. New section 19H sets out the effects of issuing a replacement notice. Where a replacement notice is issued, any appeal against the withdrawn notice continues to have effect as if it were against the replacement notice. If an employer appeals against the replacement notice he must withdraw any appeal against the withdrawn notice (subsection (2)). An officer may not start subsequent proceedings to recover arrears on behalf of the worker(s) on the basis of the withdrawn notice but any proceedings started before the notice was withdrawn may be continued (subsection (3)). Any sums already paid by the employer as a penalty in relation to the withdrawn notice is taken into account when assessing compliance with the penalty contained in the replacement notice (subsection (4)(a)). If the penalty which has already been paid by the employer is greater than the penalty in the replacement notice, the balance must be repaid to the employer with interest (subsections (4)(b) and (5)).

61. *Subsection (2)* contains a transitional provision in respect of the amendments contained in new section 19E(a) to NMWA 1998. The section in NMWA 1998 which section 19E replaces has been prospectively amended by TCEA 2007, the relevant provisions of which are not yet in force. This transitional provision allows the current wording to operate until the relevant provisions of TCEA 2007 come into force, upon which time the new wording as provided by TCEA 2007 will operate.

62. *Subsection (3)* amends section 51 of NMWA 1998 to provide that regulations under new section 19A(6) are subject to the affirmative resolution procedure.

63. *Subsection (4)* consequentially amends section 4(3)(cd) of ETA 1996, so that the provision that a Chairman alone shall hear an appeal against an enforcement or a penalty notice under section 19 and 22 of NMWA 1998 respectively, is applied instead to an appeal against a notice of underpayment.

64. Section 44 of the Commissioners for Revenue and Customs Act 2005 provides that the Commissioners shall pay money received in the exercise of their functions into the Consolidated Fund, subject to certain exceptions. One exception, in subsection (2)(f),

relates to penalties under section 21 NMWA 1998. *Subsection (5)* repeals subsection (2)(f) to allow the Commissioners for Revenue and Customs to pay financial penalties obtained under new section 19A into the Consolidated Fund.

65. *Subsection (6)* provides for consequential amendments to the Agricultural Wages Act 1948.

66. *Subsection (7)* provides that the amendments in section 9 do not have effect in relation to the enforcement of the AMW in Scotland and Northern Ireland.

Section 10: Powers of officers to take copies of records

67. Section 10 provides that officers have the power to remove records required to be kept or preserved under NMWA 1998 in order to take copies of those records.

68. *Subsection (2)* enables an officer to copy a complete record without having first to determine whether all of the record is material.

69. *Subsection (3)* provides that, where records are produced, an officer has the power to remove them for the purpose of making copies. Where an officer removes records for this purpose, they must be returned as soon as reasonably practicable.

70. *Subsection (4)* provides that the amendments in section 10 do not have effect in relation to the AMW in Scotland and Northern Ireland.

Section 11: Offences: mode of trial and penalties

71. *Subsection (1)* of section 11 provides that offences under section 31 of NMWA 1998 may be triable as indictable offences. At present, these offences are only triable as summary offences; in future they will be triable either way. *Subsection (2)* contains consequential repeals.

72. *Subsection (3)* provides that the amendments in section 11 do not have effect in relation to the AMW in Scotland and Northern Ireland.

Section 12: Powers to investigate criminal offences

73. Section 12 applies investigation powers, and their accompanying safeguards, to investigations by HMRC of criminal offences under NMWA 1998.

74. *Subsection (1)* applies provisions of the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (Northern Ireland) Order 1989 to investigations conducted by HMRC in relation to criminal offences under section 31 of NMWA 1998. These provisions will allow HMRC officers, for example, to apply for production orders and search warrants or to arrest a person suspected of committing an offence, in the same circumstances as these powers would be used in investigating other offences for which HMRC is the responsible investigating body.

75. *Subsection (2)* applies HMRC's normal Scottish criminal investigation powers to investigations of NMW criminal offences in Scotland.

Section 13: Cadet Force Adult Volunteers

76. Section 13 explicitly excludes CFAVs from qualifying for the NMW.

77. A CFAV is a member of the Cadet Forces who is assisting in the delivery of the Ministry of Defence sponsored cadet force programme. The section does not apply to those performing work for the Cadet Forces in the course of Crown employment, including employment by a Reserve Forces and Cadet Association set up under the Reserve Forces Act 1996. It does not affect any entitlement CFAVs may have to the NMW outside of their voluntary activities as a CFAV.

78. The Cadet Forces comprise of the Combined Cadet Force, Sea Cadet Corps, Army Cadet Force and Air Training Corps. Each is a separate national youth organisation supported by its own charity.

79. The Cadet Forces do not form part of the Armed Forces or the Reserve Forces, although some CFAVs may be serving members of the Armed Forces or the Reserve Forces.

Section 14: Voluntary workers

80. Voluntary workers are a special class of workers who are exempt from the NMW. Section 14 amends section 44 of NMWA 1998 to broaden the type of expenses which can be paid to voluntary workers without triggering entitlement to the NMW to include expenses which are incurred in order to enable the voluntary worker to perform his duties and are reasonably so incurred.

81. As with expenses incurred in the performance of duties, both expenses which have actually been incurred or expenses which have been reasonably estimated as likely to be or to have been so incurred can be paid to voluntary workers without triggering entitlement to the NMW.

82. New subsection (1A)(c) provides that accommodation expenses cannot be paid to voluntary workers. The effect of this amendment is to maintain the existing treatment of accommodation expenses under NMWA 1998. Whilst accommodation expenses cannot be paid, under 44(1)(b) of NMWA 1998 such accommodation as is reasonable in the circumstances of the employment can be provided directly to voluntary workers without triggering entitlement to the NMW.

Employment agencies

Section 15: Offences: mode of trial and penalties

83. Currently all offences under EAA 1973 are summary only offences and therefore triable only in the magistrates' court. Section 15 provides that certain offences committed under EAA 1973 shall be triable either on indictment in the Crown Court or summarily by the magistrates' court. The effect of this section is to increase the penalty available to the court where the offence results in conviction on indictment. Where the offences are tried in the Crown Court there is no limit on the fine that can be imposed.

84. This section also amends the maximum fine that can be imposed by a magistrates' court on conviction from a fine not exceeding level 5 on the standard scale to a fine not exceeding "the statutory maximum". At present, the statutory maximum fine is £5,000 in England and Wales and from 10 December 2007 it was increased to £10,000 for offences tried in Scotland.

85. The offences that will become triable either way under this section are:

- failure to comply with a prohibition order under section 3B of EAA 1973;
- contravention of or failure to comply with any regulations made under EAA 1973. Currently the regulations made under EAA 1973 are contained in the Conduct of Employment Agencies and Employment Businesses Regulations 2003[3]; as amended by the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2007[4]; and
- requesting or receiving (either directly or indirectly) a fee for providing work-finding services under section 6 of EAA 1973 (except where this is permitted under Conduct of Employment Agencies and Employment Businesses Regulations 2003 as amended).

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3 (SI 2003/3319)
4 (SI 2007/3575)

Section 16: Enforcement powers

86. Section 16 strengthens the powers of inspection for inspectors appointed under section 9 of EAA 1973.

87. *Subsection (2)* extends the powers of inspection available under section 9(1)(b) to enable an inspector of the Employment Agency Standards Inspectorate specifically to request financial records and documents that are held on the inspected premises which he may reasonably require to inspect to ensure compliance with EAA 1973. This is in addition to the power already contained in EAA 1973 permitting an inspector to inspect any records or documents kept as required by EAA 1973 or the Conduct of Employment Agencies and Employment Businesses Regulations 2003, as amended.

88. *Subsection (4)* substitutes a new power. Currently under section 9(1A) of EAA 1973 an inspector may require any person on the inspected premises to inform him where a record, document or information is kept and to make arrangements, where reasonably practicable, for that record, document or information to be inspected or furnished to the inspector at the premises. This power is replaced by a new power enabling an inspector by notice in writing to require the person carrying on the employment agency or employment business to furnish him with a record, document or information at such time and place as the inspector may specify.

89. The effect of this amendment is to place the requirement to furnish the required record, document or information on the person carrying on the employment agency or employment business rather than on the person present on the premises at the time of the inspection (who may not have access to the record or document or sufficient knowledge to supply the information). Enabling the inspector to specify the place at which the person carrying on the business must furnish the record, document or information will mean that the inspector will not need to revisit the inspected premises but can inspect the record, document or information at a convenient place of his choice.

90. *Subsection (5)* inserts two new powers into section 9 of EAA 1973 by inserting new subsections (1AA), (1AB) and (1AC). Where a person carrying on an employment agency or employment business fails to furnish the inspector with a record, document or information specified in a written notice, and where the inspector has reasonable cause to believe that the record, document or information is kept by a person concerned with, or formerly concerned with, the carrying on of the employment agency or employment business an inspector may by notice in writing require that person to furnish the record, document or information at such time and place as he may specify.

91. Additionally, where the record, document or information is kept by a bank (as defined by the Financial Services and Markets Act 2000) an inspector may by notice in writing require the bank to furnish the record, document or information at such time and place as he may specify.

92. *Subsection (6)* taken together with *subsection (3)* replaces the power to take copies of records and documents inspected pursuant to EAA 1973 with a power to take copies of records and documents inspected pursuant to EAA 1973 and copies of financial records and financial documents inspected in order to ascertain whether the provisions of EAA 1973 have been complied with. This wider power reflects the wider range of records and documents that an inspector may inspect. Under this wider power an inspector may remove any record or document from the premises where it is inspected in order to take a copy of it but it must be returned as soon as is reasonably practical. This will enable an inspector to take away a record or document for the purpose of taking a copy before returning it rather than, as is currently the case, relying on copying facilities at the business premises.

93. *Subsection (8)* creates the offence of obstructing an inspector in the exercise of his powers under section 9 or of contravening a requirement under section 9. A person guilty of the offence is liable on summary conviction to a fine not exceeding level 3 on

the standard scale. This subsection amends section 9(3) and extends the offence to the new powers granted by section 16.

Section 17: Offences by partnerships in Scotland

94. Section 17 provides that where an offence under EAA 1973 is committed by a partnership in Scotland, and where it is proved that the offence concerned has been committed with the consent or connivance of a partner, or is attributable to the neglect of a partner, then the partner as well as the partnership shall be guilty of the offence and prosecuted.

95. This reflects a difference between English and Scottish law. Under Scottish law a partnership is a separate legal entity, distinct from the partners who make up the partnership. This is not the case under English law.

96. Section 17 therefore enables any partners who have consented to or connived at the offence, or whose neglect has caused the offence, to be prosecuted as well as the partnership.

97. No provision was made in EAA 1973 for Scottish partnerships as until the late 1980s specific provision tended not to be made in legislation for offences committed by Scottish partnerships as it was considered that none was necessary.

Miscellaneous

Section 18: Employment agencies and national minimum wage legislation: information-sharing

98. Section 18 removes the restrictions in section 15 NMWA 1998 and section 9 EAA 1973 that prevent officers appointed under the NMWA 1998 and officers appointed under the EAA 1973 from sharing information for the purpose of their respective enforcement functions under these Acts. Currently HMRC is appointed to enforce the NMW and the Employment Agency Standards Inspectorate is appointed to enforce employment agency standards.

Section 19: Exclusion or expulsion from trade union for membership of political party

99. Section 174 of TULRCA 1992 provides a right for individuals not to be excluded or expelled from membership of a trade union, unless the exclusion or expulsion is for a reason specified by the section. Section 174(2)(d) makes it unlawful for a trade union to expel or exclude a person on the sole or main ground of "protected conduct" of that person. Sections 174(4A) and 174(4B) define "protected conduct" as membership or former membership of a political party. Section 176 of TULRCA 1992 provides remedies where the employment tribunal finds that a trade union has breached this right.

100. Section 19 retains the concept of "protected conduct" set out in sections 174 and 176 of TULRCA 1992, but amends these sections in response to the judgment made on 27th February 2007 by the European Court of Human Rights in the case of *Aslef v UK* (Application no.11002/05).

101. In the *Aslef v UK* case, the trade union had a policy to prohibit members of the British National Party from belonging to its union. An Employment Tribunal upheld a complaint under section 174 by a union member who was expelled for being a member of the British National Party. The union then complained to the European Court of Human Rights, which found that, in being prevented from expelling a member on grounds of political party membership, the union's Convention right of association had been infringed.

102. Section 19 therefore amends section 174 of TULRCA 1992 to allow a trade union to expel or exclude an individual on the basis of their membership or former membership

of a political party. *Subsection (2)* inserts new subsections (4C) – (4H) which set out the circumstances in which a trade union may expel or exclude on this basis.

103. New subsection (4C) further qualifies the definition of "protected conduct" under subsection (4A). This enables trade unions to expel or exclude individuals who belong or who have belonged to a particular political party, if membership of that political party is contrary to the rules or objectives of the trade union.

104. New subsections (4D) and (4E) provide that the relevant union "objectives" (but not rules) have to be reasonably ascertainable. If an individual is excluded from a union because he is or was a member of a political party, it must be reasonably practicable for the relevant objective to be ascertained by a person working in the same trade, industry or profession as the excluded individual at the time of their conduct. If an individual is expelled from a union on such grounds, it must be reasonably practicable for the relevant objective to be ascertained by a member of the union at the time of their conduct.

105. New subsection (4F) provides that expulsion or exclusion from a trade union remains unlawful if any of the three conditions in subsection (4G) are met. These conditions are:

- The decision to exclude or expel does not comply with the union's rules;
- The decision is taken unfairly; and
- Loss of union membership would cause the individual to lose his livelihood or suffer other exceptional hardship.

106. Subsection (4H) sets out the circumstances in which a decision is taken unfairly for the purposes of subsection (4G)(b). This has the effect that an individual must be given notice of the proposal to expel or exclude him (including reasons) and a fair opportunity to make representations, which the union must consider fairly.

107. *Subsection (3)* of section 19 amends section 176 of TULRCA 1992 to achieve consistency between the sections 174 and 176 of the 1992 Act, in line with the changes made to section 174 by new subsections (4D) and (4E). This is achieved by changing the corresponding test of what is ascertainable which is used in section 176.

General

Section 20: Repeals

108. The repeals Schedule lists those repeals which are explicitly mentioned in the sections. It also contains some consequential repeals, in particular, of legislation which inserts provisions which are themselves being repealed. The extent of the repeals is described at relevant points of the main commentary. Each Part of the Schedule will be commenced at the same time as the section or sections to which it relates.

Section 22: Commencement

109. Section 22 provides for the commencement of different provisions at different times. Sections 1 to 7 relating to dispute resolution, sections 8, 9, 11 and 12 relating to the NMW (arrears payable in cases of non-compliance, notices of underpayment, penalties for offences and powers to investigate criminal offences), section 18 relating to information-sharing between officers appointed to enforce employment agency standards and officers appointed to enforce the NMW and section 19 relating to trade union membership will come into force on such a date as the Secretary of State may by order appoint. Sections 10, 13 and 14 relating to the NMW (powers of officers to take copies of records, CFAVs and Voluntary workers) will come into force two months after Royal Assent. Sections 15 to 17 relating to employment agencies will come into force on 6 April 2009. The remaining provisions come into force on the day of Royal Assent.