

EMPLOYMENT RELATIONS (NORTHERN IRELAND) ORDER 2004

S.I. 2004 3078

EXPLANATORY MEMORANDUM

COMMENTARY ON ARTICLES

Part IV: Rights of Trade Union Members, Workers and Employees

Extension of protection against detriment for union membership etc.

Article 12 Article 73 of the 1996 Order (action short of dismissal on grounds related to union membership or activities) currently confers rights not to be subjected to detriment on these grounds only on employees, that is to say, individuals who are working under a contract of employment or, where the employment has ceased, were doing so. The effect of Article 12 is to extend the rights conferred by Article 73 to “workers” as defined in Article 2(2) of the 1995 Order, and former workers.

Detriment for use of union services or refusal of inducement

Article 13 The general effect of Article 73 as it was before the amendments made by the Order, is that an employee has the right not to have action taken against him by his employer that subjects him to any detriment where the purpose of the action is to prevent or deter membership of an independent trade union, compel membership of any trade union or prevent or deter the taking part in the activities of an independent trade union at an appropriate time. Article 13 amends Article 73 of the 1996 Order to add to the grounds on which “workers”, as defined, have the right not to be subjected to any detrimental action. The new grounds are making use of trade union services at an appropriate time and refusing an offer made in contravention of Articles 77A and 77B (see below).

Inducements relating to union membership or activities

Article 14 inserts new Articles 77A to 77F into the 1996 Order.

New Article 77A gives a worker the right not to have an offer made to him by his employer where the employer’s sole or main purpose is to induce the worker to do or not do certain things relating to trade union membership and the use of trade union services.

New Article 77B gives a new right to a worker who is a member of an independent trade union seeking recognition from, or already recognised by, the employer not to have an offer made to him by the employer where similar offers are made to other workers and the sole or main purpose in making the offers is to secure that the terms of the workers will not, or will no longer, be determined by a collective agreement negotiated with the union.

New Article 77C sets out the time limit for bringing industrial tribunal proceedings for contravention of the rights in new Articles 77A and 77B.

New Article 77D contains provisions as to how complaints under new Articles 77A and 77B are to be considered by an industrial tribunal.

New Article 77E contains the remedies that apply where an industrial tribunal finds that there has been a contravention of one of the new rights given by Articles 77A and 77B.

New Article 77F contains interpretative and other supplementary provisions eg it provides that references to “being or becoming a member of a trade union” include references to being

*This Explanatory Memorandum refers to the Employment
Relations (Northern Ireland) Order 20043078*

or becoming a member of a particular branch or section of that union or of one of a number of particular branches or sections of the union.

Dismissal for use of union services or refusal of inducement

Article 15 amends Article 136 of the 1996 Order (dismissal on grounds related to union membership or activities), the general effect of which is to make it automatically unfair to dismiss an employee if the reason or principal reason for dismissal is membership of an independent trade union, non-membership of any trade union or taking part in the activities of an independent trade union at an appropriate time. **Article 15** amends Article 136 to add making use of union services or refusing an offer made in contravention of Articles 77A and 77B to the reasons that make the dismissal of an employee automatically unfair.

Expulsion from trade union attributable to conduct

Article 16 amends Article 38 of the 1995 Order and changes the provisions in Article 40 of the 1995 Order which contain the remedies for breaching the rights contained in Article 38. It has three effects: first, that a union is free to expel where the expulsion is wholly attributable to conduct, and the conduct is neither “excluded conduct” nor “protected conduct”; secondly, that a union is free to expel where the expulsion is to some extent, but not wholly or mainly, attributable to “protected conduct”; and thirdly that a union may not expel where the expulsion is to any extent attributable to “excluded conduct”. It follows that expulsions are unlawful where “excluded conduct” is the sole, main or subsidiary reason for the union’s decision, and where “protected conduct” is the sole or main reason. Excluded conduct and protected conduct are defined in this Article.

National security: powers of industrial tribunals

Article 17 replaces paragraph (6) of Article 12 of the Industrial Tribunals (Northern Ireland) Order 1996 (NI.18) (national security) to clarify that the power conferred by paragraph (5) applies to any proceedings where a national security issue is at stake and not just Crown employment proceedings. This power provides for tribunals to invoke special hearing arrangements where national security issues arise whether or not an application is made to them to do so.

Right to be accompanied

Article 18 makes amendments to legislation relating to a worker’s “right to be accompanied” at disciplinary and grievance hearings. It clarifies the role of the companion at such hearings by amending Article 12 of the 1999 Order. It provides that the companion will now be able to address the hearing to (i) put the worker’s case; (ii) sum up that case; and (iii) respond on the worker’s behalf to any view expressed at the hearing.

Ways in which provisions conferring rights on individuals may be made

Article 19 makes a technical amendment to Article 24 of the 1999 Order. Article 24 gives the Department power by order to confer employment rights on individuals who do not have the rights by means of provisions that amend the legislation conferring the rights. The new article extends the Department’s power to confer these rights by use of free-standing provisions.

Protection of employees in respect of jury service

Article 20 amends the law to protect employees, irrespective of length of service or age, who are dismissed, or otherwise detrimentally treated, because they serve on juries or are summoned to do so.

Flexible working

Article 21 amends the law to extend to those taking advantage of statutory provisions about flexible working, certain exemptions to standard qualifying conditions for claims for unfair dismissal. These exemptions include upper age limit and participation in industrial action.