These notes refer to the Employment Relations Act 2004 (c.24) which received Royal Assent on 16 September 2004

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

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

Inducements and detriments in respect of membership etc. of independent trade unions

192. The general effect of sections 146 and 152 of the 1992 Act as they are at present is to make it unlawful for employers to subject employees to detriment (section 146) or dismiss them (section 152) on grounds of their union membership (or non-membership) or on grounds of taking part in union activities "at an appropriate time".

193. In July 2002 the European Court of Human Rights delivered its judgment in the case of *Wilson & the National Union of Journalists, Palmer, Wyeth & the National Union of Rail, Maritime & Transport Workers, Doolan & others v United Kingdom* [2002] IRLR 568 ("*Wilson and Palmer*") (a summary of the judgment can be found at http://www.echr.coe.int/Eng/Press/2002/july/WilsonandOthersjudepress.htm). The Court concluded that UK trade union law was incompatible with Article 11 of the European Convention on Human Rights (freedom of association) in that where a trade union was recognised by an employer for the purposes of collective bargaining about the terms and conditions of a group of employees, the law did not prevent the employer from offering inducements to the employees in the group to persuade them to surrender their collective representation and have their terms settled instead by negotiations between each individual employee and the employer. The Government believes that the principle underlying the decision of the Court extends beyond the facts in *Wilson and Palmer* and is applicable to a number of other comparable circumstances. The purpose of sections 29 to 32 is therefore to secure that these provisions deal not only with the facts in *Wilson and Palmer* but also with the other circumstances considered by the Government to be comparable.

Inducements relating to union membership or activities

194. ***Section 29*** inserts new sections 145A to 145F into the 1992 Act.

New section 145A

195. Subsection (1) of the new section 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. The things are (1) not to be or seek to become a member of an independent trade union, (2) not to take part in the activities of an independent trade union at 'an appropriate time', (3) not to make use of the services of a trade union at 'an appropriate time', and (4) to be or become a member of a trade union.

196. All the limbs of this right are new but while the first, second and fourth limbs reflect the matters covered by the right not to be subjected to detriment already contained in section 146 of the 1992 Act, the third limb relating to making use of union services is entirely new.

197. Subsection (2) defines the term 'an appropriate time' for the purposes of the rights given by subsection (1). The effect of the definition, which is based on the definition used in the section 146(2) of the 1992 Act as amended by sections 30 and 31, is that the limbs of the right relating to taking part in union activities and making use of trade union services apply where the worker takes part in the activities or makes use of the services outside the worker's working hours, or during them at a time when, in accordance with arrangements agreed with the employer or consent given by the employer, it is permissible for him to do so.

198. Subsection (3) defines the term "working hours" used in the definition of "an appropriate time". Working hours means any time when the worker is required to be at work by the contract under which he works.

199. Subsection (4)(a) defines "trade union services" to mean services made available to a worker by an independent trade union by virtue of his membership of the union. Subsection (4)(b) states that references to a worker making use of trade union services include "consenting to the raising of a matter on his behalf by an independent trade union of which he is a member", so ensuring that a worker consenting to his union raising a matter is regarded as making use of union services.

New section 145B

200. In general terms, new section 145B gives a new right to a worker who is a member of an independent trade union seeking recognition from or recognised by the employer not to have an offer made to him where similar offers are made to other workers and the sole or main purpose of the employer 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.

201. Subsections (1) and (2) of the new section 145B have the effect that a worker who is a member of an independent trade union recognised by, or seeking recognition from, his employer for the purpose of collective bargaining has the right not to have an offer made to him by his employer if (1) his acceptance of the offer, together with the acceptance by other workers of similar offers, would have the result ('the prohibited result') that the workers terms and conditions will not, or no longer, be determined by collective agreement negotiated by or on behalf of the union, and (2) the employer's sole or main purpose in making the offers is to achieve that result.

202. Subsection (3) has the effect that it is immaterial to the operation of the new right whether the offers are made to the workers simultaneously.

203. Subsection (4) provides that having terms of employment determined by collective agreement is not to be regarded as making use of a trade union service for the purposes of the new section 145A, or sections 146 or 152 in their form as amended by the Act. This removes the possibility of conflict between new sections 145A and 145B and ensures consistency in the interpretation of new section 145A and sections 146 and 152.

New section 145C

204. New section 145C sets out the time limit for bringing tribunal proceedings for contravention of the rights in new sections 145A and 145B. Paragraph (a) of the new section provides that a tribunal shall not consider a complaint unless it is presented within three months of the day that the offer was made or, where the offer is part of a series of similar offers, the date when the last was made. However, paragraph (b) of the new section allows a tribunal to consider a complaint presented later where it is satisfied that it was not reasonably practicable for the complaint to be presented within the normal three-month period.

New section 145D

205. New section 145D contains provisions as to how complaints under new sections 145A and 145B are to be considered by an employment tribunal.

206. Subsections (1) and (2) provide that on a complaint under new section 145A or 145B it shall be for the employer to show what his sole or main purpose in making the offer was.

207. Subsection (3) states that in determining whether the employer made an offer or the purpose for which he did so, the tribunal shall take no account of any pressure applied to the employer by the organisation of any industrial action or the threat of such action, and that the question shall be determined as if no such pressure had been applied. The wording of subsection (3) is based on section 148(2), which is the corresponding provision relating to detriment claims under section 146.

208. Subsection (4) relates only to an offer that is alleged to have contravened new section 145B. The subsection requires that in determining whether the employer's sole or main purpose in making offers was to achieve the prohibited result, the matters to be taken into account by the tribunal must include any evidence showing (1) that when the offers were made the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with the union for collective bargaining, (2) that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or (3) that offers were made only to particular workers and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer.

New section 145E

209. New section 145E contains the remedies that apply where an employment tribunal finds that there has been a contravention of one of the new rights given by sections 145A and 145B.

210. Subsections (1) and (2) have the effect that if the tribunal finds a complaint to be well-founded it is to make a declaration to that effect and make an award to be paid by the employer to the worker in respect of the offer complained of.

211. Subsection (3) has the effect that the award to be paid to the worker is a fixed sum of £2,500 but that the award can be subject to a reduction or increase under the provisions of the Employment Act 2002.

212. Subsection (4) relates to offers in contravention of sections 145A or 145B that have been accepted. Subsection (4)(a) has the effect that if the acceptance of the offer resulted in the worker agreeing to vary his terms of employment later, the employer cannot enforce the agreement to vary or recover any sum paid or other asset transferred that constituted the inducement.

213. Subsection (4)(b) has the effect that if the acceptance of the offer resulted in variations of the worker's terms of employment nothing in new sections 145A or 145B makes the variations unenforceable by either the employer or the worker.

214. Under section 146 as it is at present, an employee already has the right not to have action taken against him by his employer that subjects him to detriment where the ground for taking the action is membership or non-membership of a trade union or taking part in the activities of a trade union. It should be noted that section 146, as amended by section 30 of the Act, will include the right not to be subjected to detriment on the ground of making use of "trade union services" (as defined in section 146 as amended) or of a failure to accept an offer made in contravention of new section 145A or 145B.

215. Subsection (5) makes it clear that neither the rights given by new sections 145A and 145B nor the remedies contained in new section 145E prejudice any right conferred on

a worker by section 146 or 149 of the 1992 Act. This ensures that any worker who is subjected to a detriment because he has not accepted an offer that is unlawful under new section 145A or 145B is able to complain to an employment tribunal both under section 146 and under new section 145A or 145B. This ability for the worker to claim under both the sections relevant to his circumstances means that his refusal of the offer need not have the result that he loses out financially. It also means that the incentive for workers to accept an offer that contravenes section 145A or 145B is reduced.

216. Subsection (6) provides that in ascertaining compensation under section 149, no reduction may be made on the ground that a complainant contributed to his loss by accepting or not accepting an offer contravening section 145A or 145B or that the complainant has received or is entitled to receive an award in respect of such a contravention.

New section 145F

217. New section 145F contains interpretative and other supplementary provisions, and is modelled on section 151 of the 1992 Act as amended by sections 30 and 31 of the Act. Subsection (1) provides that references to "being or becoming a member of a trade union" include references to being 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.

218. Subsection (2) ensures, consistently with subsection (1), that references to "taking part in the activities of a trade union" and to "services made available by a trade union by virtue of membership of the union" include taking part in the activities of and the services made available by a particular branch or section of the union or one of a number of particular branches or sections. This ensures that the rights conferred by new section 145A apply where it is a branch of the union that is involved rather than the union itself.

219. Subsection (3) defines the meaning of "worker" and "employer" for the purposes of sections 145A to 145E. "Worker" is defined as an individual who works or normally works:

- under a contract of employment; or
- under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client; or
- in employment under or for the purposes of a government department (except the armed forces) where the employment is not under a contract mentioned in above.

Sections 145A to 145E are drafted so that a worker who has a right conferred on him by section 145A or 145B can bring a complaint in respect of a breach of that right even if he does not bring it while he is still a worker. "Employer" is defined as the person for whom the worker works, or, in the case of a former worker, the person for whom he worked.

220. Subsection (4) provides that the remedy for an infringement of the rights conferred on an individual by sections 145A to145E is by way of a complaint to an employment tribunal in accordance with Part III of the 1992 Act, and not otherwise.

Extension of protection against detriment for union membership etc.

221. ***Section 30***. Section 146 of the 1992 Act (detriment on grounds related to union membership or activities) currently confers rights 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.

222. The effect of *section 30* is to extend the rights conferred by section 146 to "workers". *Subsection (8)* inserts into section 151 the same definitions of "worker" and "employer" as are used for the purposes of sections 145A to 145E (see paragraph 219 above).

223. *Subsections (1) to (5)* amend section 146 of the 1992 Act to substitute the term "worker" for the term "employee" and ensure that the section works properly in relation to circumstances where the individual is a worker but not an employee.

224. *Subsection (6)* inserts a new subsection (5A) into section 146 providing that the section does not apply where the worker (that is the worker mentioned in subsection (1), (2C) or (3) of section 146) is an employee and the detriment he suffers is dismissal. The reason is that where an employee is dismissed for reasons that correspond to the grounds mentioned in section 146 he is able to claim unfair dismissal under section 152 of the 1992 Act (which section 32 amends to cover dismissal for use of union services or the refusal of an offer infringing new section 145A or 145B).

Detriment for use of union services or refusal of inducement

225. ***Section 31***. The general effect of section 146 as it was before the amendments made by the Act, 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 ground for taking the action 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. Section 31 amends section 146 to add to the grounds on which "workers", as defined in section 151 (as amended by section 30) have the right not to be subjected to any detrimental action.

226. *Subsection (2)* amends subsection (1) of section 146 and has the effect that a worker has the right not to be subjected to any detriment by an act (including a deliberate failure) done by his employer for the purpose of preventing or deterring him from making use of trade union services at "an appropriate time" or penalising him for doing so.

227. *Subsection (3)* amends subsection (2) of section 146 to extend the meaning of "an appropriate time" already contained in the section to the use of trade union services. The result is that the definition of "an appropriate time" used here is the same as that used in the new section 145A(2) inserted by section 29.

228. *Subsection (4)* inserts new subsections (2A) to (2D) into section 146.

229. New subsection (2A)(a) defines "trade union services" to mean services made available to a worker by an independent trade union by virtue of his membership of the union. Subsection (2A)(b) states that references to a worker's making use of trade union services include "consenting to the raising of a matter on his behalf by an independent trade union of which he is a member", so ensuring that a worker consenting to his union raising a matter is regarded as making use of union services.

230. New subsection (2B) has the effect that if an independent trade union raises a matter on behalf a worker who is a member of the union, with or without his consent, penalizing him for that is to be treated as penalising him for making use of union services.

231. New subsection (2C) gives a worker the right not to be subjected to any detriment by an act (including a deliberate failure) done by his employer because of the worker's failure to accept an offer infringing the worker's rights under new section 145A or 145B inserted by section 29.

232. New subsection (2D) has the effect that where a worker is not given a benefit that he would have been given had he accepted an offer infringing his rights under section 145A or 145B, the failure by the employer to give him the benefit shall be taken to subject him to a detriment. This ensures that a worker treated in this way can complain to an employment tribunal not only about the making of the offer that infringed his rights

but also about the detriment resulting from the failure to give him the benefit contained in the offer.

233. *Subsection (5)* repeals subsections (3) to (5) of section 148 of the 1992 Act (consideration of complaint under 146 of the 1992 Act). Subsections (3) to (5) of the 1992 Act had the effect that where an employee was subjected to a detriment by an act, or deliberate failure to act, by his employer this was not caught by section 146 if the employer's purpose was "to further a change in the relationship with all or any class of his employees". This expression covered the case where an employer made an offer for the purpose of inducing employees to give up a right to have their terms of employment determined under a collective agreement, that is to say the situation that arose in *Wilson and Palmer*, and therefore meant that section 146 did not give any protection to employees in that situation.

234. *Subsections (6) and (7)* replace the part of section 51(1) relating to taking part in the activities of a trade union with a new subsection (1A) of section 151 securing that references in sections 146 to 150 to "taking part in the activities of a trade union" and to "services made available by a trade union by virtue of membership of the union" relate to taking part in the activities of and the services made available by a particular branch or section of the union or one of a number of particular branches or sections. This ensures that the interpretation to be given to these expressions in sections 146 to 150 is consistent with that to be given to them in new sections 145A to 145E (inserted by section 29) by virtue of new section 145F.

235. *Subsection (8)* repeals section 17 of the Employment Relations Act 1999. Section 17 of the 1999 Act provided a power for the Secretary of State to make regulations to protect workers against dismissal and detriment for refusing to enter into an individual contract which includes terms different from those in a collective agreement which would otherwise apply. Section 17 was never commenced and has been superseded by sections 31 and 32.

Dismissal for use of union services or refusal of inducement

236. ***Section 32*** amends section 152 of the 1992 Act (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 trade union at an appropriate time. Section 32 amends section 152 to add to the reasons that make the dismissal of an employee automatically unfair.

237. *Subsection (2)* amends subsection (1) of section 152 and makes it automatically unfair to dismiss an employee if the reason or principal reason for his dismissal is that he had made use, or proposed to make use, of trade union services at an appropriate time, or that he had failed to accept an offer made in contravention of new sections 145A or 145B.

238. *Subsection (3)* amends subsection (2) of section 152 to extend the meaning of "an appropriate time" already contained in the section to the use of trade union services. The result is that the definition of "an appropriate time" used here is the same as that used in the new section 145A(2).

239. *Subsection (4)* inserts new subsections (2A) and (2B) into section 152.

240. New subsection (2A)(a) defines "trade union services" to mean services made available to an employee by an independent trade union by virtue of his membership of the union. Subsection (2A)(b) states that references to an employee's making use of trade union services include "consenting to the raising of a matter on his behalf by an independent trade union of which he is a member", so ensuring that an employee consenting to his union raising a matter is regarded as making use of union services.

241. New subsection (2B) has the effect that if the reason or principal reason for dismissing an employee who is a member of an independent trade union is that the union raised a

matter on his behalf, with or without his consent, the employee shall be treated as being dismissed for making use of union services.

242. *Subsections (5) and (6)* replace the part of section 152(4) relating to taking part in the activities of a trade union with a new subsection (5) securing that references in section 152 to "taking part in the activities of a trade union" and to "services made available by a trade union by virtue of membership of the union" relate to taking part in the activities of and the services made available by a particular branch or section of the union or one of a number of particular branches or sections. This ensures that the interpretation to be given to these expressions in sections 152 is consistent with that to be given to them in sections 146 to 150 by virtue of section 151 (as amended by section 31), and in new sections 145A to 145E (inserted by section 29) by virtue of new section 145F.

Exclusion and expulsion from trade unions

The previous position

243. Section 174 of the 1992 Act provides rights for individuals not to be excluded or expelled from a trade union. In particular, subsection (2)(d) of section 174 provides that a union may exclude or expel someone for their conduct provided the exclusion or expulsion is "entirely attributable" to that "conduct". However, subsection (4) of that section provides that certain conduct does not count as "conduct" for the purpose of subsection (2)(d). This conduct is:

- current or former membership of a trade union;
- current or former employment by a particular employer or at a particular place;
- current or former membership of a political party; or
- conduct for which disciplinary action taken by a union would be regarded as unjustifiable (section 65 of the 1992 Act).

244. It follows that if an exclusion or expulsion is partly attributable to conduct in this list it is contrary to section 174.

245. These provisions have caused difficulties for unions when tackling the problem of political activists from extremist political parties infiltrating their ranks; recent relevant cases[1] have illustrated the problems faced by unions.

246. Section 176 of the 1992 Act provides the remedies for an unlawful exclusion or expulsion. Under its provisions, an individual whom an employment tribunal holds to have been unlawfully excluded or expelled may apply later for compensation. Where the individual has been admitted or re-admitted to the union, the application must be made to an employment tribunal. However, where the individual has not been admitted or re-admitted, the application must be made to the Employment Appeal Tribunal (EAT). In these latter cases, a minimum compensatory award (set at £5,900 from February 2004) applies.

Exclusion or expulsion from trade union attributable to conduct

247. ***Section 33*** amends section 174 of the 1992 Act and changes the provisions in section 176 of the 1992 Act which contain the remedies for breaching the rights contained in section 174. These amendments make it clear that trade unions are entitled to exclude an individual wholly or mainly for taking part in the activities of a political party, and introduce new compensation arrangements where the tribunal considers that an exclusion or expulsion was attributable mainly to membership of a political party. It leaves the existing law unchanged in other conduct cases.

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1 *Mr. J. Lee v Aslef* (ET case no. 1301889/02) and *Mr. C. Potter v UNISON* (ET case no. 19000120/2003).

248. *Subsection (2)* amends section 174(2)(d). It has three effects: firstly, that a union is free to exclude or expel where the exclusion or expulsion is wholly attributable to conduct, and the conduct is neither "excluded conduct" nor "protected conduct"; secondly, that a union is free to exclude or expel where the exclusion or expulsion is to some extent, but not wholly or mainly, attributable to "protected conduct"; and thirdly that a union may not exclude or expel where the exclusion or expulsion is to any extent attributable to "excluded conduct". It follows that exclusions and 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.

249. "Excluded conduct" and "protected conduct" are defined at *subsection (3)* which inserts a revised subsection (4) and new subsections (4A) and (4B) into section 174 of the 1992 Act. "Excluded conduct" is defined in revised subsection (4). It includes those types of conduct, other than membership of a political party, which are set out in the existing subsection (4) of section 174 and currently fall outside the definition of "conduct". "Protected conduct" is defined at new subsection (4A) as being or ceasing to be, or having been or ceased to be, a member of a political party. New subsection (4B) qualifies this definition by making it clear that political activities of any kind do not fall within the definition of "protected conduct".

250. *Subsection (4)* inserts four new subsections into section 176 of the 1992 Act, which concerns the remedies for unlawful exclusions and expulsions.

251. New subsection (1A) of section 176 provides that where a tribunal makes a declaration that a complaint is well-founded under section 174 the tribunal shall make a further declaration in cases where the exclusion or expulsion was mainly attributable to "protected conduct" stating that the exclusion or expulsion was mainly so attributable.

252. New subsection (1B) concerns the circumstances where both of these declarations have been made and provides for the tribunal to make a further declaration. If it appears to the tribunal that the other conduct to which the exclusion or expulsion was attributable consists wholly or mainly of conduct which was contrary to the rules of the union or an objective of the union, then the tribunal is to make a declaration to that effect.

253. New subsection (1C) provides that it is immaterial for the purposes of subsection (1B) whether the complainant was a member of the union at the time of the conduct contrary to the rule or objective.

254. New subsection (1D) provides that a declaration by virtue of subsection (1B)(b) shall not be made unless the union shows that it was reasonably practicable for the complainant to have ascertained the objective(s) in question, at the time of the conduct of his that is in question. The subsection also provides that if the complainant was not a member of the union at the time of the conduct then the objective(s) in question must have been reasonably practicable for a member of the public to ascertain and that if the complainant was a member of the union at the time of the conduct then the objective(s) in question must have been reasonably practicable for a union member to ascertain.

255. *Subsection (5)* makes a consequential change to the existing subsection 176(3)(a).

256. *Subsection (6)* inserts two new subsections into subsection (6) of section 176 of the 1992 Act relating to the level of the compensation to be awarded. New subsection (6A) provides that if, on the date the application for compensation was made to the tribunal under section 176, the individual had not been admitted or re-admitted into the union, then the tribunal shall not award less than the current minimum of £5,900 in compensation. New subsection (6B) provides that this minimum does not apply when the tribunal has made the declarations mentioned in both new subsection (1A) and new subsection (1B) of section 176.

257. *Subsection (7)* provides that references in sections 174 and 176 to the conduct of an individual include references to conduct which took place before the coming into force of the section.

Applications no longer to be made to Employment Appeal Tribunal

258. ***Section 34*** amends section 176 of the 1992 Act to secure that where an unlawfully excluded or expelled individual has not been admitted, or re-admitted, to the union at the time when he makes his application for compensation his application for compensation is to be made to the employment tribunal and not, as before, to the EAT. It also makes corresponding changes to section 67 of the 1992 Act concerning the remedies for unjustifiable discipline, which have the effect that all applications for compensation under that jurisdiction are also required to be made to an employment tribunal.

Other rights of workers and employees

Disapplication of qualifying period and upper age limit for unfair dismissal

259. ***Section 35*** replaces section 154 of the 1992 Act with a new section 154 altering the test that disapplies the qualifying period and the upper age limit provided by sections 108(1) and 109(1) of the Employment Rights Act 1996 in relation to complaints to employment tribunals of alleged breaches of sections 152 and 153 (dismissal or selection for redundancy on grounds related to union membership or activities). It has the effect of ensuring that the burden of proof lies on the employer to show the reason for dismissal in all complaints of unfair dismissal, or selection for redundancy, on trade union related grounds, including cases where the employee has less than a year's service or has passed the upper age limit.

National security: powers of employment tribunals

260. ***Section 36***replaces subsection (6) of section 10 of the Employment Tribunals Act 1996 (c.17) (procedure regulations in relation to cases involving issues of national security) to clarify that the power conferred by that subsection 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

261. ***Sections 37 and 38*** make amendments to the legislation relating to the "right to be accompanied" in disciplinary and grievance hearings.

262. The 1999 Act introduced a statutory duty on employers to permit workers invited or required to attend certain disciplinary and grievance hearings to be accompanied by a companion falling within the category of people listed in subsection (3) of section 10 (a fellow worker or certain trade union officials). The "companion" is permitted to address the hearing (but not to answer questions on behalf of the worker) and confer with the worker during the hearing.

Role of companion at disciplinary or grievance hearing

263. ***Section 37*** clarifies the role of the companion at disciplinary hearings by amending section 10 of the 1999 Act. New subsections (2A), (2B) and (2C) replace the current subsection (2). New subsection (2A) reiterates that the employer must permit the worker to choose the companion as long as the companion falls within the category of people in subsection (3) (which is not being amended).

264. New subsection (2B) expands on what the employer must permit the companion to do at a hearing. Paragraph (a) of subsection (2B) 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. Paragraph (b) of subsection (2B) repeats the current provision in the 1999 Act that the companion may confer with the worker during the hearing. The companion is thus able to address the hearing on more than one occasion, and is entitled to respond to views expressed.

265. New subsection (2C) provides that the employer is not required to permit the companion to answer questions on the worker's behalf (paragraph (a)), address the hearing if the worker indicates that he does not wish the companion to do so (paragraph (b)), or use the powers in a way that prevents the employer from explaining his case or any other person making his contribution (paragraph (c)).

266. *Subsection (2)* of section 37 ensures that references to the right to be accompanied in section 11 of the 1999 Act refer to the extended meaning specified in subsections (2A) and (2B).

267. *Subsection (3)* adds a new subsection (3A) to section 12 of the 1999 Act. It makes it clear that where a worker attends a hearing as a companion of another worker, he is protected against detriment and dismissal not only in respect of the act of accompanying the worker but also for addressing or seeking to address the hearing (as permitted under new subsection (2B)).

Extension of jurisdiction of Employment Appeal Tribunal

268. ***Section 38*** corrects an oversight in the 1999 Act. It ensures that the Employment Appeal Tribunal has jurisdiction to hear appeals against employment tribunal decisions in relation to the right to be accompanied. This oversight received judicial confirmation in *Refreshment Systems Ltd (t/a Northern Vending Services) v. Wolstenholme* [2003] UKEAT 0608-03-2710.

Ways in which provisions conferring rights on individuals may be made

269. ***Section 39***makes a technical amendment to section 23 of the 1999 Act.

270. Section 23 gives the Secretary of State the power by order to confer the employment rights contained in specified Acts and in subordinate legislation implementing European legislation on individuals that do not have the rights

271. As the words of the section stand, the order is only allowed to achieve these results by means of provisions that amend the legislation conferring the right, and not by means of a provision simply saying that the right applies to the individuals in question (a free-standing provision). New subsections (5A) and (5B) have the effect that an order will be able to extend employment rights either by the use of a free-standing provision or by amending the legislation conferring the right.

Protection of employees in respect of jury service

272. ***Section 40*** amends the law to protect employees who are dismissed, or otherwise detrimentally treated, because they serve on juries or are summoned to do so.

273. *Subsections (1) and (2)* insert a new section (section 43M) into the Employment Rights Act 1996. The new section provides that an employee has the right not to be subjected to detrimental treatment on the ground that he has been summoned for jury service or has been absent on jury service. Detrimental treatment does not include failure to pay remuneration during such an absence unless the employee's contract of employment entitles him to be paid during the absence.

274. *Subsection (3)* inserts new section (section 98B) into the 1996 Act. The new section provides that it is unfair to dismiss an employee because he has been summoned for jury service or has been absent on jury service. It does not apply if the employer shows that his undertaking was likely to suffer substantial injury if the employee was absent; that he made this known to the employee; and that the employee nevertheless unreasonably refused or failed to apply to the appropriate officer to be excused from jury service, or to have his service deferred.

275. *Subsections (4) and (5)* add section 98B to the list, contained in section 105 of the 1996 Act, of reasons for which it is unfair to dismiss an employee on grounds of redundancy (if others in the same circumstances are not dismissed).

276. *Subsection (6)* adds section 98B to the list, contained in section 108(3) of the 1996 Act, of exceptions to the requirement for one year's qualifying service before being able to bring a claim for unfair dismissal.

277. *Subsection (7)* adds section 98B to the list, contained in section 109(2) of the 1996 Act, of exceptions to the rule that an employee who has reached the "normal retiring age", or otherwise the age of 65, may no longer bring a claim for unfair dismissal.

278. *Subsections (8) and (9)* amend sections 237 and 238 of the 1992 Act. Section 237 provides that an employee dismissed while taking unofficial industrial action has no right to complain of unfair dismissal. Section 238 has the general effect that an employee dismissed while taking part in official industrial action or involved in a lock-out only has a right to claim unfair dismissal if some of the other employees taking part or involved are not dismissed, or (where all are dismissed) if he is not offered re-engagement and some of the others are. Subsections (8) and (9) add section 98B to the list of exemptions to these provisions.

Flexible working

279. ***Section 41*** amends the law to extend to those taking advantage of the statutory provisions about flexible working certain exemptions to standard qualifying conditions for unfair dismissal. It also ensures that the flexible working provision inserted into the Employment Rights Act 1996 ("the ERA 1996 Act") is correctly cross-referred to in other parts of legislation.

280. Section 104C of the ERA 1996 Act provides that where an employee is dismissed, and the reason (or the main reason) is that the employee made or proposed to make a flexible working application, exercised or proposed to exercise a right under section 80G, brought proceedings against the employer under section 80H, or alleged the existence of any circumstance giving grounds for bringing such proceedings, he will be regarded as having been unfairly dismissed.

281. Section 237 of the 1992 Act provides that an employee dismissed while taking part in unofficial industrial action has no right to complain of unfair dismissal. Section 238 of the 1992 Act has the general effect that an employee dismissed while taking part in official industrial action or involved in a lock-out only has a right to claim unfair dismissal if some of the other employees taking part or involved are not dismissed or (where all are dismissed) if he is not offered re-engagement and some of the others are.

282. *Subsections (1) and (2)* of section 41 add section 104C to the list of exemptions to these provisions. Accordingly an employee dismissed for a reason connected with a flexible working application can complain of unfair dismissal despite being involved in official or unofficial industrial action.

283. *Subsection (4)* inserts a new subsection (7BA) into section 105 of the ERA 1996 Act. It ensures that where an employee is selected for redundancy and the reason or principle reason for his selection was one of those specified in section 104C this will be treated as an unfair dismissal.

284. *Subsection (5)* adds section 104C to the list, contained in section 108(3) of the 1996 Act, of exemptions to the requirement for one year's qualifying service before being able to bring a claim for unfair dismissal. To qualify for the right to request flexible working, an employee need only have 26 weeks' continuous employment (in addition to other qualifying factors). This subsection ensures that the protection against unfair dismissal contained in section 104C applies to all employees qualified to request flexible working.

285. *Subsection (6)* adds section 104C to the list, contained in section 109(2) of the 1996 Act, of exemptions to the rule that an employee who has reached the "normal retiring age", or otherwise the age of 65, may no longer bring a claim of unfair dismissal. This subsection ensures that the protection against unfair dismissal contained in section 104C applies to employees regardless of their age.

286. In 2002, two provisions were inserted after section 47C in Part 5 of the Employment Rights Act 1996 by primary legislation: the first by the Tax Credits Act 2002 and the second by the Employment Act 2002. The provision inserted by the Tax Credits Act became 47D, and after a correction to the numbering, the flexible working provision was inserted by the Employment Act 2002 as 47E.

287. However the change in the numbering of the flexible working provision was not reflected in a series of consequential amendments listed in Schedule 7 of the 2002 Act. The result is that sections of the 1996 Act incorrectly refer to section 47D (inserted by the Tax Credits Act, and not section 47E (flexible working)).

288. *Subsections (3), (7) and (8)* ensure that references to section 47E of the 1996 Act replace the incorrect reference to section 47D in sections 48, 194,195 and 199 of the same Act.

Information and Consultation: Great Britain

289. ***Section 42*** enables the Secretary of State to make regulations regarding the right of employees, or their representatives, to be informed and consulted by their employer in relation to matters prescribed in the regulations. The regulations to be made under this power will implement the EC Directive on Information and Consultation (Directive 2002/14/EC) which establishes a general framework for informing and consulting employees in the European Community ("the Directive").

290. The Directive was agreed on 11 March 2002 and Member States are required to implement it by 23 March 2005. Article 1 of the Directive states that its purpose is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in the European Community. The practical arrangements are left to Member States to determine. The Department of Trade and Industry published a discussion paper, *High Performance Workplaces: The role of employee involvement in a modern economy*, in July 2002. Discussions also took place with the CBI and the TUC on how the requirements of the Directive should be implemented. The CBI and TUC agreed on a framework for implementation and on the basis of that agreement, a consultation document, *High Performance Workplaces: Informing and Consulting Employees*, was issued on 7 July 2003 to seek views from a wider audience on the proposed scheme. Draft regulations were included in the consultation document. (A copy of both documents, and the Government's response are available on the DTI website at www.dti.gov.uk/er/consultation).

291. The powers under section 2(2) of the European Communities Act 1972, which are usually used to implement EU Directives are not considered sufficiently wide to cover all aspects of the proposed regulations, so this section provides a general power to make regulations.

292. *Section 42(2)* provides that regulations made under this section must make provision as to the employers to whom they apply. *Paragraph (a)* of section 42(2) provides that these provisions may stipulate that the regulations apply to the employer's undertaking by reference to factors that include the number of employees employed in the undertaking; *paragraph (b)* provides that the regulations may stipulate the method by which the number of employees in the undertaking is to be calculated; and *paragraph (c)* has the effect that the regulations may apply to undertakings of different sizes from different dates.

293. Article 3 of the Directive provides that Member States have the option of applying the implementing legislation to "undertakings" employing at least 50

employees or "establishments" employing at least 20 employees ("undertakings" and "establishments" are both defined in Article 2). In either case, it is for the Member State concerned to determine the method for calculating the number of employees employed. The draft regulations apply to undertakings of 50 or more employees.

294. Article 10 of the Directive contains transitional provisions which allow certain Member States to implement the Directive in stages until 23 March 2008 depending on the number of employees employed in the undertaking or establishment. The DTI intends to take advantage of this derogation and to provide that the regulations will apply initially to undertakings with 150 or more employees from March 2005, to undertakings with between 100 and 149 employees from March 2007 and to undertakings with between 50 and 99 employees from March 2008.

295. *Section 42(4)(a)* makes provision for the regulations to provide that employment tribunals will have jurisdiction to resolve disputes arising out of them and to confer jurisdictions on the Employment Appeal Tribunal; it is intended that this power will be used in relation to the protection of individual rights under the regulations.

296. *Section 42(4)(b)* enables the Secretary of State to confer functions on the Central Arbitration Committee and it is intended that this will be used to allow the CAC to resolve disputes under the more general provisions of the regulations. Paragraph (c) of subsection (4) provides that the regulations may require or authorise the holding of ballots and paragraph (d) provides that they may make amendments to, or apply similar provisions to, those in (1) the Employment Rights Act 1996 (in particular Part 5 which relates to protection from suffering detriment in employment; Part 10 which relates to unfair dismissal; and Part 13 which relates to particular types of employment), (2) the Employment Tribunals Act 1996 (which confers jurisdictions on employment tribunals and the Employment Appeal Tribunal), and (3) the 1992 Act.

297. *Section 42(5)* is a general power for the Secretary of State to make whatever additional provisions may be necessary to implement the requirements of the Directive and deal with related matters.

298. *Subsections (7) and (8)* provide that the regulations to are to be made by a statutory instrument that is subject to the affirmative resolution procedure.

Information & Consultation: Northern Ireland

299. ***Section 43*** provides separate powers for the Department of Employment and Learning Northern Ireland (DELNI) to make regulations on information and consultation.

300. Although the Information and Consultation Directive applies to the UK as a whole, employment is a devolved matter in Northern Ireland and it will put in place its own regulations on information and consultation. DELNI intends to make regulations mirroring those the Government intends to make in relation to Great Britain, and also issued the consultation document; *High Performance Workplaces: Informing and Consulting Employees*, in 2003 (see paragraph 290 for internet link).

301. During times when the Northern Ireland Assembly is suspended, Northern Ireland usually implements employment legislation which mirrors employment legislation in Great Britain by means of an Order in Council. DELNI proposes to bring forward legislation mirroring the provisions of this Act in this way. However, during House of Commons Committee an amendment was made to the Bill, at the request of the Minister for Employment and Learning Northern Ireland, to provide a power to enable DELNI to make regulations on information and consultation directly under the Act. This will enable Northern Ireland to meet the March 2005 deadline for implementing the Information and Consultation Directive regardless of whether devolution is restored in the meantime.

302. The powers in section 43 mirror those in section 42 as described in the paragraphs above, save for the need to make specific reference to Northern Ireland institutions and legislation in subsections (1), (4), (5), (7), (8) and (9).