

2005 No. 872 (C.36)

TERMS AND CONDITIONS OF EMPLOYMENT

**The Employment Relations Act 2004 (Commencement No.3 and
Transitional Provisions) Order 2005**

Made - - - -

15th March 2005

The Secretary of State, in exercise of the powers conferred upon her by section 59(3) and (4) of the Employment Relations Act 2004(a), hereby makes the following Order:

Citation and interpretation

1. This Order may be cited as the Employment Relations Act 2004 (Commencement No. 3 and Transitional Provisions) Order 2005.

2. In this Order—

“the Act” means the Employment Relations Act 2004;

“the 1992 Act” means the Trade Union and Labour Relations (Consolidation) Act 1992(b);

“the 1996 Act” means the Employment Rights Act 1996(c);

“the 1998 Act” means the National Minimum Wage Act 1998(d); and

“Schedule A1” means Schedule A1 to the 1992 Act.

3. In this Order, save where the text otherwise indicates, references to sections and Schedules are references to sections of and Schedules to the Act.

Commencement

4. 6th April 2005 is the appointed day for the coming into force of the provisions of the Act listed in the first column of the Schedule to this Order for the purposes set out in the second column.

Transitional Provisions

5. The coming into force of the provisions listed in the Schedule to this Order is subject to the transitional provisions in articles 6 to 21.

6.—(1) The amendments made to Schedule A1 by sections 1 to 5, 6(1) and 7 do not apply to any application for recognition which is accepted by the CAC under paragraph 15(5) of Schedule A1 before the appointed day.

(a) 2004 c. 24.
(b) 1992 c.52.
(c) 1996 c.18.
(d) 1998 c.39.

(2) The amendments made to Schedule A1 by section 6(2) do not apply to any application for a decision which is accepted by the CAC under paragraph 68(5) or 76(5) before the appointed day.

7. The provisions inserted into Schedule A1 by section 8 do not apply where, before the appointed day, the CAC has informed the parties, in accordance with paragraph 25(9) or 117(11) of Schedule A1.

8. The amendments made to Schedule A1 by section 11 do not apply to any application which is made to the CAC under paragraph 11 or 12 of Schedule A1 before the appointed day.

9.—(1) The amendments made to Schedule A1 by section 12 do not apply in relation to any notice which the employer gives, for the purposes of paragraph 99(2) of Schedule A1, to the union (or each of the unions) before the appointed day.

(2) Notwithstanding their repeal by Schedule 2, paragraphs 101(4) and (5), 109(2)(a), 113(2)(a) and 130(2)(a) of Schedule A1 will apply in relation to any notice which the employer gives, for the purposes of paragraph 99(2) of Schedule A1, before the appointed day.

10. The provisions inserted into Schedule A1 by section 14 and paragraph 23(6) of Schedule 1 do not apply in relation to any demand which the person appointed to conduct the ballot sends, under paragraph 28(4) or 120(4) of Schedule A1, to the employer and the union (or each of the unions) before the appointed day.

11. The amendments made to section 238A of the 1992 Act by sections 26, 27 and 28, and the provision inserted into the 1992 Act by section 28, do not apply to protected industrial action taken by an employee where the employee starts to take the action before the appointed day.

12. The amendments made to the 1992 Act by section 35 and to the 1996 Act by paragraphs 30, 32 and 33 of Schedule 1 do not apply in the case of any dismissal where the effective date of termination (within the meaning of section 97 of the 1996 Act) is before the appointed day.

13. The amendments made to the 1992 Act and the 1996 Act by sections 40 and 41 do not apply in the case of any dismissal where the effective date of termination (within the meaning of section 97 of the 1996 Act) is before the appointed day or in the case of any detriment where the act or deliberate failure to act is before the appointed day.

14. The provisions inserted into the 1998 Act by section 44 do not apply to any information which is obtained by an enforcement officer for the purposes of the relevant legislation before the appointed day.

15. The provisions inserted into the 1998 Act by sections 45 and 46 and the amendments made to that Act by section 46 do not apply in relation to any enforcement notice which is issued before the appointed day.

16. The provisions inserted into the 1992 Act by section 48 do not apply to any application or complaint which is made to the Certification Officer before the appointed day.

17. The amendments made to the 1992 Act by section 50(1) do not apply to any instrument submitted to the Certification Officer for approval before the appointed day.

18. The provisions inserted into the 1992 Act by section 50(2) and (3) do not apply to any application for registration of an instrument of amalgamation or transfer which is sent to the Certification Officer before the appointed day.

19.—(1) The amendments made to the 1992 Act by section 51 do not apply to any refusal or decision of the Certification Officer made before the appointed day.

(2) Notwithstanding its repeal by Schedule 2, section 126(2) will apply to any refusal or decision of the Certification Officer made before the appointed day.

20. The amendments made to the 1992 Act by paragraph 6 of Schedule 1 do not apply to any order made under section 82(3) before the appointed day.

21. Until the appointed day for the coming into force of sections 9, 10 and 13 the references in Schedule A1 to paragraphs 27D(3), 27D(4), 119A(3)(a)(ii), 119D(3), 119D(4), 129E(1)(b), 119H(1), 119(1), 119H(5) and 119I(1)(a) (which paragraphs 23(9) to (14), (19), (20) and (24) to (27) of Schedule 1 insert into Schedule A1) shall be of no effect.

Gerry Sutcliffe
Parliamentary Under Secretary of State for Employment Relations
Consumers and Postal Services
Department of Trade and Industry

15th March 2005

SCHEDULE

Article 4

PROVISIONS OF THE EMPLOYMENT RELATIONS ACT 2004 COMING INTO FORCE ON 6th APRIL 2005

<i>Provisions of the Act</i>	<i>Purpose</i>
Section 1 (application for decision on whether proposed bargaining unit is appropriate)	For all purposes
Section 2 (power of the CAC to end period for agreement on bargaining unit)	For all purposes
Section 3 (duty of employer to supply information to union)	For all purposes
Section 4 (determination of appropriate bargaining unit)	For all purposes
Section 5 (union communications with workers after acceptance of application)	For all purposes
Section 6 (circumstances in which the CAC must arrange a ballot)	For all purposes
Section 7 (power of the CAC to extend notification period)	For all purposes
Section 8 (postal votes for workers absent from ballot at workplace)	For all purposes
Section 11 (application where agreement does not cover pay, hours and holidays)	For all purposes
Section 12 (employer's notice to end bargaining arrangements)	For all purposes
Section 14 (appeals against demands for costs)	For all purposes
Section 16 (means of communicating with workers)	For all purposes
Section 17 (unfair practices: power to make provision about periods before notice of ballot)	For all purposes
Section 19 (information about union membership and employment in bargaining unit)	For all purposes

<i>Provisions of the Act</i>	<i>Purpose</i>
Section 20 (“pay” and other matters subject to collective bargaining)	For all purposes
Section 21 (information required by ACAS for ballots and ascertaining union membership)	For all purposes
Section 23 (entitlement to vote in ballot on industrial action)	For all purposes
Section 24 (inducement of members not accorded entitlement to vote)	For all purposes
Section 26 (dismissal where employees taking protected industrial action locked out)	For all purposes
Section 27 (date of dismissal)	For all purposes
Section 28 (dismissal after end of protected period)	For all purposes
Section 35 (disapplication of qualifying period and upper age limit for unfair dismissal)	For all purposes
Section 40 (protection of employees in respect of jury service)	For all purposes
Section 41 (flexible working)	For all purposes
Section 44 (information supplied by worker and employer)	For all purposes
Section 45 (enforcement notices)	For all purposes
Section 46 (withdrawal and replacement of, and appeals against, notices)	For all purposes
Section 47 (enforcement officers for agricultural wages legislation)	For all purposes
Section 48 (striking out by Certification Officer of applications or complaints)	For all purposes
Section 49 (restriction of proceedings orders: proceedings before Certification Officer)	For all purposes
Section 50 (amalgamations: approval, listing and certification)	For all purposes
Section 51 (restriction on grounds of appeal from Certification Officer)	For all purposes
Section 52 (additional case in which election for president of union not required)	For all purposes

<i>Provisions of the Act</i>	<i>Purpose</i>
Section 53 (removal of rule preventing appointment of body corporate as auditor)	For all purposes
Section 55 (provision of money for trade union modernisation)	For all purposes
Section 57 (minor and consequential amendments and repeals)	For the purposes of the provisions of Schedules 1 and 2 brought into force by this Order
In Schedule 1 (minor and consequential amendments) - paragraphs 1-7, 13-15, 19, 22, 23 (with the exception of paragraph 23(22) and (23)), 28-30, 32-41	For all purposes
In Schedule 2 (repeals) the entries relating to the – Agricultural Wages Act 1948(a)	For all purposes
Trade Union and Labour Relations (Consolidation) Act 1992 (all remaining entries with the exception of sections 226A, 234A and paragraph 119(3) of Schedule A1)	For all purposes
Employment Tribunals Act 1996(b)	For all purposes
Employment Rights Act 1996	For all purposes
Employment Act 2002(c)	For all purposes

(a) 1948 c.47.
(b) 1996 c. 17.
(c) 2002 c. 22.

EXPLANATORY NOTE

(This note is not part of the Order)

This is the third commencement order made under the Employment Relations Act 2004 (“the Act”). The provisions which come into force on 6th April 2005 are listed in the Schedule to the Order. They comprise the bulk of the provisions of the Act which were not commenced by the first and second commencement orders.

The Order brings into force a number of provisions which amend Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”). These include provisions clarifying how the appropriate bargaining unit is to be determined by the Central Arbitration Committee (“CAC”) (sections 1 and 4). There are provisions addressing issues as to communications between the union and the bargaining unit, for example, section 5 which provides for the appointment of a suitable independent person to handle union correspondence with members of a bargaining unit when the CAC has accepted an application for recognition. Section 8 provides for postal voting for workers away from the workplace at the time of a workplace ballot. Section 20 confirms that, in relation to collective bargaining, “pay” does not include occupational or personal pension schemes. A number of provisions are designed to speed up the recognition or derecognition process, for example, section 2 which enables the CAC to terminate the period for reaching agreement on a bargaining unit, section 3 which requires the employer to provide certain information to the union and section 7 which enables the CAC to extend the period for the parties to reach agreement without the need for a time-consuming ballot.

The order commences section 21 of the Act which gives ACAS the power to require information from parties where it is asked to settle a recognition dispute.

A number of provisions of the Act which the Order commences deal with the law relating to industrial action. In particular, section 26 amends the protections which the 1992 Act provides for employees taking lawfully-organised, official industrial action. The protected period is extended from eight to twelve weeks and “locked out” days are disregarded when calculating this period. Section 28 introduces new matters to which a tribunal is to have regard when assessing whether an employer has taken reasonable procedural steps to resolve a dispute with a union. The duty to have regard to these matters applies where the parties have accepted that the services of a conciliator or mediator will be used.

The Order also commences provisions of the Act which deal with a number of rights for workers and employees, for example, section 40 amends the Employment Rights Act 1996 (“the 1996 Act”) to provide that an employee has the right not to be dismissed or treated detrimentally because he serves on a jury or is summoned to do so. The 1996 Act is further amended to provide that selection for redundancy, where the reason or one of the principal reasons is connected to the employee’s jury service, will be treated as an unfair dismissal. The right to bring a claim for unfair dismissal in relation to jury service is not subject to the requirement of one year’s qualifying service, nor is it restricted to those who have not reached their employer’s or the normal retirement age for their job or are otherwise below 65. Similarly, section 41 of the Act extends certain protections to those taking advantage of the statutory provisions relating to flexible working. Thus, an employee dismissed for making a flexible working application can complain of unfair dismissal even when involved in official or unofficial industrial action. Flexible workers, those applying to be so or complaining in relation to some aspect of their treatment as such are protected in respect of unfair dismissal and are not subject to the requirements as to length of service or age.

Sections 44 to 46 of the Act amend the National Minimum Wage Act 1998 (“the 1998 Act”) and the Agricultural Wages Act 1948. Section 44 allows for greater disclosure of information obtained by enforcement officers under the 1998 Act and section 46 introduces new provisions into the 1998 Act which enable an enforcement officer to withdraw or replace an enforcement or penalty notice.

Sections 48 to 51 of the Act make amendments to the procedures relating to the exercise of functions by the Certification Officer. These include new powers to deal with vexatious cases and litigants (sections 48 and 49 of the Act).

Section 55 of the Act deals with the provision of money for trade union modernisation. Money may only be provided for certain specified purposes and is deemed to be provided on terms which prohibit any of it being added to a union's political fund.

The order contains a number of transitional provisions to deal with particular matters which are on-going at the time of commencement.

NOTE AS TO EARLIER COMMENCEMENT ORDERS

(This note is not part of the Order)

The following provision of the Employment Relations Act 2004 have been brought into force by commencement orders made before the date of this Order —

<i>Provisions of Act</i>	<i>Date of Commencement</i>	<i>S.I. No</i>
Section 15	31.12.2004	2004/3342
Section 18	31.12.2004	2004/3342
Sections 29 to 32	01.10.2004	2004/2566
Sections 33 and 34	31.12.2004	2004/3342
Section 36	31.12.2004	2004/3342
Sections 37 and 38	01.10.2004	2004/2566
Section 39	31.12.2004	2004/3342
Section 54	31.12.2004	2004/3342
Schedule 1 —		
paragraphs 8 to 12	01.10.2004	2004/2566
paragraphs 16 to 18	01.10.2004	2004/2566
paragraphs 20 and 21	01.10.2004	2004/2566
paragraphs 24 and 25	01.10.2004	2004/2566
paragraphs 26 and 27	31.12.2004	2004/3342
paragraph 31	01.10.2004	2004/2566
paragraph 42(1), (2) and (4)	01.10.2004	2004/2566
paragraph 42(3)	31.12.2004	2004/3342
paragraph 43	01.10.2004	2004/2566
Schedule 2, the entries relating to —		
sections 146, 148, 151(1), 152 and 155 of the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52)	01.10.2004	2004/2566
sections 67 and 176 of that Act	31.12.2004	2004/3342
section 17 of the Employment Relations Act 1999 (c.26)	01.10.2004	2004/2566
section 23(5) of that Act	31.12.2004	2004/3342

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