THE EMPLOYMENT (NORTHERN IRELAND) ORDER 2003

S.I. 2003 No. 2902 (N.I. 15)

EXPLANATORY MEMORANDUM

COMMENTARY ON PROVISIONS

10. A summary of each Article follows. Comments are not given where the wording is self-explanatory.

Article 1: Title and commencement
Article 1 cites the title of the Order. This is the title by which the Order will be known. *Article 1* gives the Department power to bring the provisions of the Order into operation by one or more commencement orders.

Article 2: Interpretation
Article 2 provides for the interpretation of the Order and defines the terms used in the Order.

Article 3: Conciliation
Article 3 provides for industrial tribunal procedure regulations to introduce a fixed period during which parties can avail of the conciliation service provided by the LRA. The aim of fixing a time period in this manner, albeit with a degree of inbuilt flexibility, is to focus the minds of disputants upon the importance of reaching agreement rather than allowing the dispute to become unduly protracted. Delayed settlements cost time, money and, on occasion, goodwill. The objective is to introduce a system that encourages earlier conciliated settlements where possible, without preventing settlements at the last minute if there seems a strong likelihood of this occurring.
The fixing of a time period is achieved by amending Article 9 of the Industrial Tribunals (Northern Ireland) Order 1996 ("ITO") to allow for regulations to be made enabling the postponement of the fixing of a time and place for a tribunal hearing to allow for proceedings to be settled through conciliation. It is intended that the regulations will set out the length of the conciliation period and will provide for its extension only in cases where the conciliator considers that settlement within a short additional timeframe is very likely. The aim is to encourage earlier settlements, where there is a present tendency towards last-minute settlements on the 'doorstep' of the tribunal. In the event of conciliation failing, the dispute will be passed back to the tribunal and a hearing date can then be fixed.
The LRA's duty to conciliate cases, by an amendment to Article 20 of ITO, reverts to a power to do so after the conciliation period has ended. The effect will be that, once the conciliation period is over, the conciliation officer can judge whether to continue to conciliate the case or to pass it back to the Office of the Industrial Tribunals and Fair Employment Tribunal.

Article 4: Power to delegate prescription of forms, etc.
Article 4, which inserts a new paragraph into Article 9 of ITO, provides that industrial tribunal procedural regulations may empower the Department to prescribe a form to be used for applications to institute tribunal proceedings (form IT1). This provision will create a similar power to prescribe a form for respondents to use in providing a formal response to the applicant's claim (form IT3). The rules may also empower the Department to require certain documents to accompany the forms. The aim of this provision is to bring greater consistency to the tribunal application process and to furnish tribunal panels with more comprehensive information regarding

the case before them. Such information will help the tribunal in deciding whether the application would benefit from a pre-hearing review, preliminary consideration or case management hearing, and the length of time required for any hearing. An assessment of the strength of the other side's case could also be made, which in itself could encourage settlement.

***Article 5*: Determination without a hearing**

Article 5 substitutes a new paragraph (3A) in Article 9 of ITO. This provides for industrial tribunal procedure regulations to authorise the determination of proceedings without a hearing of cases in certain circumstances. This is intended only where both parties agree and have had access to independent advice. This would be subject to the tribunal deciding that there should be an oral public hearing notwithstanding the parties' agreement to the contrary.

***Article 6*: Practice directions**

Article 6 enables industrial tribunal Rules of Procedure to be amended to enable the President to issue practice directions to Chairmen as to how procedures are to be applied. This is achieved by inserting a new Article 9A after Article 9 of ITO. The procedure regulations may contain provisions about securing compliance with practice directions and their publication. They may also make reference to provision made or to be made by practice directions, instead of making such provision themselves.

The aim of the provisions of *Article 6* is to ensure that industrial tribunals adopt a consistent approach to procedural issues and to the interpretation of their powers under the Rules of Procedure. It is anticipated that this will reinforce confidence among users of industrial tribunals by demonstrating that cases are being dealt with in a uniform manner.

***Article 7*: Pre-hearing reviews**

Article 7 amends Article 11 of ITO. It clarifies the power of industrial tribunals to strike out an originating application at the pre-hearing stage. Industrial tribunals may currently carry out preliminary considerations (pre-hearing reviews) and, if it is found at the review that the party's case has no reasonable prospect of success, a deposit can be required as a condition of proceeding to a full hearing. At present the power to strike out is limited and rarely used.

Article 7 therefore removes from Article 11 of ITO the implication that pre-hearing reviews are "preliminary" hearings. The effect of the changes is to allow rules to permit a case to be struck out at a pre-hearing review, provided this is not done on grounds which do not apply outside a pre-hearing review. Such grounds include instances where anything in the originating application or notice of appearance is scandalous, misconceived or vexatious. The objective is to improve the efficiency of case handling and restrict the amount of time that tribunals spend on considering cases which are obviously misconceived. However, the power to demand a deposit remains and is likely to continue to be the main sanction used against weak cases at pre-hearing reviews.

Examples of cases where it could be appropriate to exercise the power to strike out at pre-hearing review include:

- cases in which the facts have already been litigated and the applicant has no fresh or different evidence but insists on pursuing the case;
- cases where the facts are not in dispute, but the interpretation placed on those facts by one party is clearly wrong;
- cases in which a party's application is not itself sufficient to lead to a successful outcome, and the party has stated at the pre-hearing review that no further evidence or witnesses would be called.

Since evidence is not considered at the pre-hearing review, the strike-out option will only be appropriate in cases where the tribunal is satisfied that there is no need to consider the evidence, or where there is no conflict of evidence.

***Article 8*: Costs, expenses and allowances**

Article 8 extends the scope of Article 15 of ITO by substituting a new paragraph (1) specifying that regulations may provide for the award of costs or expenses or allowances. This provision enables the Department to empower industrial tribunals to award costs against a representative. In its application, it is intended that this provision will deter vexatious or abusive behaviour on the part of paid representatives only. It could mean that the representative may not recover fees from the client, or may be required to pay costs incurred by the client or the other party to the case. It

is intended that regulations will include safeguards to allow the representative the opportunity to put a case on any proposed award. Regulations will also be able to define "representative" so as to exclude the 'not-for-profit' sector from wasted costs orders.
By inserting a new Article 15A in ITO through Article 8(2) of the Order, the Department will be empowered by regulations to authorise a tribunal to order one party to pay costs in respect of the time spent by the other party in preparing a case. It is not intended that the parties should have to provide detailed evidence of the actual time they have spent preparing for a case, but that the tribunal should make an assessment based on guidelines to be set out in industrial tribunal Rules of Procedure. It is intended that the new awards could be made only in the circumstances in which a costs award may be made at present, that is, where the party's case is misconceived, or they or their representative have behaved vexatiously, abusively, disruptively or otherwise unreasonably.
The new ITO Article 15A provides that the regulations on costs and preparation time must include a provision that the tribunal may not make an award of both costs and preparation time in favour of the same person in the same proceeding.
Specific powers are included for the procedure regulations to allow tribunals to take into account a party's ability to pay when making a costs or preparation time award. It is intended that this will enable the tribunal to exercise discretion in considering a party's means, where appropriate. This will be given effect in the regulations.

***Article 9*: Power to delegate prescription of forms, etc.**
Article 9 makes provision for the Fair Employment Tribunal comparable to that made for industrial tribunals by *Article 4*. It does so by amending Article 84 of the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO). The aims of the provision are identical to those outlined in relation to *Article 4*.

***Article 10*: Determination without a hearing**
Article 10 inserts a new paragraph (2B) in Article 84 of FETO to provide for Fair Employment Tribunal procedure regulations to authorise the determination of cases without a hearing in certain circumstances. The purport is analogous to that of *Article 5* in relation to industrial tribunals.

***Article 11*: Conciliation**
Article 11 substitutes a new paragraph (4) in Article 84 of FETO to provide for Fair Employment Tribunal procedure regulations to introduce a fixed period during which parties can avail of the conciliation service provided by the LRA. The fixing of a time period is achieved by amending Article 84 of FETO to allow for regulations to be made enabling the postponement of the fixing of a time and place for a tribunal hearing to allow for proceedings to be settled through conciliation. The LRA's duty to conciliate cases, by an amendment to Article 88 of FETO, reverts to a power to do so after the conciliation period has ended. The purport of the measure is comparable to that of *Article 3* in relation to industrial tribunals.

***Article 12*: Practice directions**
Article 12 provides for Fair Employment Tribunal Rules of Procedure to enable the President to issue practice directions to Chairmen as to how procedures are to be applied. This is achieved by inserting a new Article 84A into FETO. The aim of the provisions of *Article 12* is the same as that of *Article 6* in relation to industrial tribunals.

***Article 13*: Pre-hearing reviews and preliminary matters**
Article 13 enables the Fair Employment Tribunal to carry out a pre-hearing review and to strike out an originating application at the pre-hearing stage. This replaces the existing limited power for an officer of the Fair Employment Tribunal to determine matters arising prior to a hearing. The new powers are conferred by way of a new Article 84B introduced into FETO. The purpose of the changes is analogous to that of *Article 7* in relation to industrial tribunals.

***Article 14*: Costs and allowances**
Article 14 inserts new Articles 85A and 85B after Article 85 of FETO. It provides that the Fair Employment Tribunal may include in awards of costs and allowances consideration of time spent preparing a case. The Fair Employment Tribunal is also enabled to order payment of costs or allowances by a party in respect of vexatious behaviour. In making such awards, however, regard

must be had to ability to pay. *Article 14* has the same purport in relation to the Fair Employment Tribunal as *Article 8* has with regard to industrial tribunals.

Article 15*: *Statutory dispute resolution procedures

Article 15 gives effect to a set of minimum statutory disciplinary and grievance procedures in *Schedule 1* to which employers and employees will be expected to adhere. Under a disciplinary procedure, an employer can complain to an employee about his conduct or performance. Such procedures are sometimes termed "dismissal procedures" where they deal with complaints or issues that can lead to the dismissal of an employee. Grievance procedures operate in the opposite direction and deal with formal complaints initiated by an employee against his employer.

Under current law, industrial tribunals consider the existence and use of disciplinary procedures in unfair dismissal cases. An employer's failure to use procedures appropriately can result in a determination by an industrial tribunal that a dismissal was unfair. Tribunals must also take account of the LRA Code of Practice on Disciplinary and Grievance Procedures and any internal procedures the employer may have, when determining the reasonableness or otherwise of the employer's decision to dismiss. The use of procedures can also affect the size of an award an employee may receive when unfairly dismissed.

Each of the new disciplinary and grievance procedures involves three standard steps, with meetings to consider complaints and appeal processes. *Schedule 1* also specifies a short modified version of each procedure involving just two written steps where meetings are not feasible in the circumstances. *Article 15* also contains provisions enabling the Department to amend these statutory procedures by order, following consultation with the LRA.

Article 16*: *Contracts of employment

Article 16 implies in every contract of employment a duty to observe the statutory dispute procedures in circumstances specified by the Department in regulations. Employers and employees are prevented from contracting out of this implied term. The aim is to encourage parties to resolve their differences through the proper use of internal procedures.

Article 17*: *Non-completion of statutory procedure: adjustment of awards by industrial tribunals

Article 17 provides that, where the minimum statutory procedures specified under *Article 15* have not been followed, an award made by an industrial tribunal may be varied. The variation in the award, upward or downward according to the source of the procedural neglect, may be between 10-50%, except where this would be inequitable. Where exceptional circumstances may make a reduction or increase inequitable, the variation may be less than 10%, or nothing at all. In cases specified by the Department, exemptions from the need to follow statutory procedures are possible. The adjustments are to be made before reductions under *Article 27* for contributory fault or redundancy payments in excess of the basic award.

Together, the jurisdictions listed in *Schedule 2* cover the overwhelming majority of industrial tribunal claims. *Article 17* enables the Department to add to, or remove jurisdictions from the list. It also provides the Department with powers to make provision as to how the statutory procedures will apply for these purposes. These powers enable the Department in particular to specify circumstances where an employee or an employer is to be treated as having complied with a statutory procedure, even though none or only some of the required actions have been taken. Thus, the regulations could provide for exemptions from some of the requirements of the statutory procedures in particular circumstances.

The rationale behind this provision is to reduce the number of cases going forward to tribunal where employers or employees have failed to use existing internal workplace procedures.

Once again, it is envisaged that costly and damaging litigation will be reduced by encouraging disputants to resolve their differences, where possible, in the workplace.

Article 18*: *Non-completion of statutory procedure: adjustment of awards by Fair Employment Tribunal

Article 18 is the analogue to *Article 17*, with relevance not to industrial tribunal jurisdictions, but to applications to the Fair Employment Tribunal under Article 38 of FETO. The adjustments to awards under *Article 18* are to be made before reductions under *Article 28* for contributory fault or redundancy payments in excess of the basic award.

***Article 19*: Complaints about grievances: industrial tribunals**
Article 19 specifies jurisdictions, as set out in the accompanying *Schedule 3*, to which the Article applies. It prevents certain categories of complaint from being presented to an industrial tribunal until Step 1 of the grievance procedures, detailed in *Schedule 1*, has been completed and at least 28 days have elapsed thereafter. The Department is empowered to make provision about the application of the grievance procedure and what constitutes compliance. The aim is to enable grievances to be resolved, where possible, close to their source in the workplace.

***Article 20*: Complaints about grievances: Fair Employment Tribunal**
Article 20 is the analogue to *Article 19* in relation to applications to the Fair Employment Tribunal made under Article 38 of FETO. As with *Article 19*, the aim is to enable grievances to be resolved, where possible, in the workplace.

***Article 21*: Consequential adjustment of time limits: industrial tribunals**
Article 21 is an enabling power allowing the Department to make regulations about the time limits for beginning certain proceedings in an industrial tribunal. In particular, this provision is designed to permit time for the relevant statutory procedures to be completed before a complaint is presented to an industrial tribunal. Regulations may cover extending the time for beginning proceedings, the exercising of discretion to extend the time for the beginning of proceedings and the treating of proceedings begun out of time as having been begun within time. This is designed to allow the relevant statutory procedures to be completed. It is envisaged that regulations will enable an extension of three months to be applied to allow for the completion of statutory procedures.

***Article 22*: Consequential adjustment of time limits: Fair Employment Tribunal**
Article 22 is an analogue to *Article 21*, allowing regulations to permit extension of time limits in relation to Fair Employment Tribunal cases brought under Article 38 of FETO.

***Article 23*: Procedural fairness in unfair dismissal**
Article 23 makes it unfair for an employer to dismiss an employee without meeting obligations under the relevant statutory procedure.
At present, if an ex-employee makes a complaint to a tribunal that he has been unfairly dismissed, then the former employer needs to meet two tests to show that the dismissal was fair and reasonable. Firstly, it must be demonstrated that the reason for the dismissal was one of five reasons listed in Article 130 of the Employment Rights (Northern Ireland) Order 1996 (“ERO”). Secondly, it must be demonstrated that the dismissal was reasonable, a concept that has given rise to much complex case law, the culmination of which came in the form of a House of Lords decision *(Polkey vs A E Dayton Services Ltd, 1988)*. The decision had the effect of finding fault with an employer who failed to follow appropriate disciplinary procedures before dismissal even where adhering to procedure would have made no difference to the outcome of the case. It has been argued that this judgement, by removing the so-called ‘no difference’ test, forces tribunals to put undue weight on questions of disciplinary procedure, rather than on the actual reasons for the dismissal.
Article 23, by inserting a new Article 130A into ERO, has the effect of rendering a dismissal unfair if the employer has failed to follow the minimum grievance procedure outlined in *Schedule 1*. Provision is made that an employee will generally receive a minimum of four weeks’ pay as compensation where unfair dismissal takes place and the minimum disciplinary and dismissal procedure has not been complied with. However, a tribunal will be able to disregard procedural mistakes beyond the minimum where these have no impact on the outcome of the case.

***Article 24*: Particulars of procedures relating to discipline or dismissal**
Article 24 amends Article 35 of ERO to provide that the part of the written statement of employment particulars dealing with disciplinary and grievance matters must cover the procedures which apply when an employee is dismissed or disciplined. At present, an employer is obliged to provide a new employee with details of their main terms and conditions not later than two months after the employee starts work with the employer, and must furnish the employee with details when these change. However, currently, there is only a requirement that the statement describe steps to be taken where an employee is dissatisfied with disciplinary action taken against

them. The change made by *Article 24* ensures that all stages of the new minimum disciplinary and dismissal procedures must be set out in the written statement.

***Article 25*: Removal of exemption for small employers**

Article 25 removes an exemption currently excepting those employing fewer than 20 people from the requirement to refer to disciplinary rules and the new minimum procedures in the written statement of particulars provided to employees.

***Article 26*: Use of alternative documents to give particulars**

Article 26 inserts new Articles 39A and 39B into ERO allowing greater flexibility to be afforded to employers in providing written particulars. It will be possible for employers to include particulars in a copy of the contract of employment or letter of engagement given to the employee to form, or to form part of, the written statement. This will reduce the need for employers to duplicate existing documents. It will be possible to furnish an employee with such documents before their employment begins.

***Article 27*: Failure to give statements of employment particulars, etc.: industrial tribunals**

Article 27 makes it mandatory for industrial tribunals, in dealing with claims under jurisdictions specified in *Schedule 4*, to make certain awards where an incomplete or inaccurate written statement has been provided. Industrial tribunals are required to increase the award by 2 or 4 weeks' pay, or to award 2 or 4 weeks' pay where compensation is not a possible or desirable remedy. The decision as to whether to award 2 or 4 weeks' pay is a matter for the tribunal's discretion. No award need be made or increased if the tribunal considers such a course of action unjust or inequitable.

***Article 28*: Failure to give statements of employment particulars, etc.: Fair Employment Tribunal**

Article 28 makes provisions for applications made under Article 38 of FETO. The provisions parallel those made in *Article 27* in relation to industrial tribunals.

Article 29*: Unfair dismissal: adjustments under *Articles 17* and *27

Article 29 inserts a new Article 158A in ERO, dealing with adjustments to an award made by an industrial tribunal under *Articles 17* or*27*.

***Article 30*: Equal pay questionnaires**

Article 30 inserts a new Section 6B into the Equal Pay Act (Northern Ireland) 1970, making provision for the prescription of forms to be used by claimants and respondents in equal value cases, which can be admitted as evidence in subsequent tribunal proceedings. Tribunals may draw inference from an employer's failure to respond to a questionnaire. The procedure will include prescription of forms, questions and answers as case evidence, a time period for serving questions, and the manner in which these questions and answers can be served. The questionnaire will enable key facts to be established early and should assist the settlement of some cases before they proceed to an industrial tribunal.

A questionnaire procedure is currently available to individuals pursuing disputes over other forms of discrimination, but is not yet used in equal pay disputes. The procedure has proven useful elsewhere, since it assists applicants to set out key facts before a tribunal hearing. The question and answer format can help to identify whether the case is weak or strong. The process is familiar to industrial tribunals, as it has been in place for some time under the Sex Discrimination (Northern Ireland) Order 1976, the Disability Discrimination Act 1995, and the Race Relations (Northern Ireland) Order 1997.

It will also be possible for prescription, by order, of a time period within which questions must be served in order to be admissible as evidence in tribunal proceedings. This is intended to encourage the applicant to pursue a case swiftly. If a tribunal considers that the respondent deliberately and without reasonable excuse failed to reply within the period prescribed, it will be able to draw any inference it considers just or equitable. Tribunals will also be able to draw such an inference if it is considered that the respondent's reply was evasive or equivocal.

***Article 31*: Union learning representatives**

Article 31 provides rights for union learning representatives ("ULRs") analogous to those enjoyed by officials of an independent trade union which is recognised by their employer for collective bargaining purposes. It does so by inserting into ERO a new Article 92A. Provision is also made by this insertion to extend the right to unpaid time off for union members accessing the services of a ULR. The LRA and the Department are empowered to issue a Code of Practice providing practical guidance on the application of these entitlements to reasonable time off. A tribunal claim may be presented where the employer has failed to provide such time off, and a tribunal may award compensation accordingly.

ULRs provide advice about training, educational and developmental needs. At present, they do not enjoy the same rights as officials of independent trade unions recognised at a given workplace for collective bargaining purposes. These rights, established under Article 92 of ERO, are to reasonable time off during working hours to carry out union duties or undergo relevant training. An employer who permits such time off must pay the officials for the time off taken, in accordance with Article 93 of ERO.

Additionally, employees are currently entitled, under Article 94 of ERO, to reasonable time off during working hours to participate in union activities. This right applies where the employees belong to an independent union recognised by their employer, and where they form part of the bargaining unit for which the union is recognised. The definition of an "independent trade union" is provided in Article 2 of ERO. Employers are not required to pay their employees when they permit them to take this time off.

***Article 32*: Dismissal procedures agreements**

Article 32 inserts a new paragraph (3A) after paragraph (3) of Article 142 of ERO. Currently, the Department may designate certain agreements as Dismissal Procedures Agreements ("DPAs"). This has the effect of replacing the statutory right to claim unfair dismissal before an industrial tribunal under Part XI of ERO with access to the procedures of the DPA for employees who are covered by the agreement. Such an agreement must meet a number of specific criteria. Among these are:

- a joint application is made to the Department by all parties to the agreement, and;
- the scheme offers remedies that are on the whole as beneficial (but not necessarily identical with) those provided in respect of unfair dismissal at a tribunal.

Article 32 empowers the Department to add to these criteria. This is intended to give scope to bring in requirements aimed at ensuring that DPAs comply with the Human Rights Act 1998. It is achieved by giving the Department power by order to add to the requirements in section 142(3) of ERO.

***Article 33*: Deputy Certification Officer**

Article 33 enables the Certification Officer for Northern Ireland to appoint one or more assistants to discharge delegated functions that he may deem it suitable for them to perform. This is achieved by substituting a paragraph in Article 69 of the Industrial Relations (Northern Ireland) Order 1992.

***Article 34*: Regulations and orders**

Article 34 makes provision in relation to regulations and orders under the Order, requiring various levels of approval by the Northern Ireland Assembly in order for regulations to be made.

***Article 35*: Amendments and repeals**

Article 35 gives effect to *Schedule 5*, which makes consequential amendments following the making of this Order, and *Schedule 6*, which contains repeals.